

compel the testimony of North and Poindexter.

My experience as a district attorney in Philadelphia for some 8 years has given me background on the operation of limited-use immunity, and succinctly stated, Mr. President, the only limitations on prosecution from such limited-use immunity is that the testimony of North and Poindexter, or leads from that testimony, may not be used in a criminal prosecution against them. But evidence which is gathered independently may be used in such a criminal prosecution.

During the Watergate investigation evidence was compiled and sealed prior to the time that limited-use immunity was granted to witnesses in those proceedings, and then there was no question of taint as to the evidence which was in existence and sealed with the court prior to the time that those witnesses testified.

That same procedure can be followed as to North and Poindexter. If in fact there are criminal prosecutions, that evidence could be drawn together in a relatively brief period of time which the independent counsel would have under the operation of the statute. Under the statute the independent counsel is entitled to 10 days' notice, and the court has the discretion to limit the pursuit of the immunity for an additional period of 20 days. The independent counsel has had a protracted period of time to conduct and investigate, and there are facts of record.

This matter was considered, Mr. President, by the Intelligence Committee during the month of December. There were some of us on the Intelligence Committee who felt that time that it was in the public interest to proceed as promptly as possible with the full exploration of all of the facts on the Iran-Contra matter because of the importance of finding the facts, getting to the bottom of it, letting the chips fall where they may, assess blame, assess criminality, and move on to the important business of the Government.

These competing interests, Mr. President, between special prosecutor and the Senate investigating committee were thoroughly considered during the Watergate era, and in that time, Special Prosecutor Archibald Cox objected to the grant of immunity by the Ervin committee, headed by Senator Ervin. The courts ruled that the public policy interests of the congressional investigating body, the Senate select committee, took precedence over the interests of the prosecution.

For a time, Mr. President, the entire Government of the United States virtually was run out of the Intelligence Committee hearing room when we had a procession of witnesses including then Chief of Staff Don Regan, Secretary of State George Shultz, Secretary of Defense Caspar Weinberger, Attorney General Edwin Meese, and many other Federal officials. There contin-

ues to be a significant preoccupation with the Iran-Contra matter and there are disclosures almost on a daily basis with renewed allegations that the President may have known about the diversion of funds to the Contras.

These issues are of paramount importance to the operation of our Government, and these issues should take precedence with the Senate select committee.

It is really a matter of the tail wagging the dog, with the independent counsel insisting that he be given a protracted period of time to complete his investigation. Not only is the tail wagging the dog, but the tail is wagging the country.

That is why I am submitting this sense-of-the-Senate resolution, Mr. President, because I think the national public interest requires that all of the facts be disclosed on the Iran-Contra matter at the earliest possible time, especially since the criminal prosecutions against North, Poindexter, and others can be maintained at the same time.

Mr. President, I ask unanimous consent that the text of the resolution be printed in the RECORD.

There being no objection, the resolution was ordered to be printed in the RECORD, as follows:

#### S. RES. 165

Whereas, the Nation's interests demand full disclosure at the earliest possible time regarding the sale of arms to Iran and the diversion of funds to the Contras; and

Whereas, the courts have established that the Congressional interest in eliciting testimony must, in the event of conflict, take precedence over the interests of prosecutors; and

Whereas, prosecutions of key witnesses can, in any event, be preserved by sealing all relevant evidence prior to a grant of limited use immunity; and

Whereas, the testimony of Admiral John Poindexter and Lt. Col. Oliver North is indispensable to a full explanation of the Iran/Contra matters; Therefore be it

Resolved, That it is the Sense of the Senate that the Senate Select Committee investigating these matters should promptly grant limited "use" immunity to Admiral Poindexter and Lt. Col. North, so that their sworn testimony can be compelled.

#### ORDER OF PROCEDURE

Mr. BYRD. Mr. President, under the order of yesterday, when the orders for the recognition of Senators, each for not more than 5 minutes, were completed today, Senators were to be permitted to speak out of order for not to exceed 30 minutes.

Senators who were to be recognized under the 5-minute orders are not on the floor. I would express hope that always in the future when Senators have 5-minute orders, they be on the floor ready to claim their recognition as has been programmed. Otherwise, the Senate does have to move on with the rest of the program because I do not care for these exceedingly long quorum calls which sometimes occur

when we cannot get Senators to come to the floor.

I therefore ask that that part of the order which was for the recognition of Senators to speak out of order for not to exceed 30 minutes each proceed at this time since no Senator with a 5-minute order is on the floor at this time seeking recognition.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. BYRD. I ask unanimous consent that that period for speaking out of order not extend beyond 2 p.m. today.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. BYRD. I thank the Chair.

Mr. NUNN addressed the Chair.

The ACTING PRESIDENT pro tempore. The Senator from Georgia.

#### INTERPRETATION OF THE ABM TREATY

##### PART ONE: THE SENATE RATIFICATION PROCEEDINGS

Mr. NUNN. Mr. President, let me first thank the majority leader for making some time available to me today. I have a rather lengthy presentation that will bore some people to tears but which is very important from the point of view of the Senate as an institution and from the point of view of our interpretation of the ABM Treaty.

Unfortunately, I also have a case of laryngitis so my presentation may not be as clear as would otherwise be the case. I apologize to my colleagues for that.

Mr. President, today we have ongoing a hearing under the auspices of the Foreign Relations Committee and the Judiciary Committee. I will be testifying on this same subject around 2 o'clock this afternoon at that hearing. I believe Senator BIDEN will be chairing the hearing. It started this morning.

I think it is appropriate that those two committees be linked in having a joint hearing today because they are considering a very important treaty, and treaties are not only of central importance in our foreign policy, and, therefore, of interest to the Foreign Relations Committee, but they are also the law of the land and should be of interest to all of us, especially the Judiciary Committee.

Furthermore, the Reagan administration's unilateral interpretation of the ABM Treaty constitutes a fundamental constitutional challenge to the Senate as a whole with respect to its powers and prerogatives in this area. The seriousness of this challenge has been further underscored in recent weeks by the administration's new claim that testimony during Senate treaty ratification proceedings "has absolutely no standing" in terms of establishing other parties' obligations

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be no basis for abandoning the traditional interpretation as clearly understood by the Senate at the time it gave its advice and consent on the basis of this understanding. Absent compelling evidence that the Senate was misinformed as to the agreement between the United States and the Soviet Union, the compact reached between the Senate and the executive branch at the time of ratification in my view, should be upheld.

The third possibility, and perhaps the most disturbing possibility: If the negotiating record and evidence of the subsequent practices of the United States and Soviet Union establish a conclusive basis for the reinterpretation—in other words, if Judge Sofaer is right on the negotiating record—this would mean that the Nixon administration signed one contract with the Soviets and the Senate ratified a different contract. Such a conclusion would have profoundly disturbing constitutional implications—to say the least. In effect, the President would have to choose between the executive branch's obligations to the Senate and its contract with the Soviet Union. If the President did not choose to honor the commitments to the Senate, the Senate will then be faced with developing an appropriate response or risk having its role in the treaty-making process become meaningless.

In two reports which I intend to present to the Senate within a few days, I will address the subsequent practice of the two parties and the treaty negotiating record with a view toward determining which of the three situations now confront the Senate.

Mr. President, I ask that my complete record of this analysis be printed in the RECORD following this statement.

There being no objection, the report was ordered to be printed in the RECORD, as follows:

INTERPRETATION OF THE ABM TREATY  
PART ONE: THE SENATE RATIFICATION  
PROCEEDINGS

(By Senator Sam Nunn, March 11, 1987)

PREAMBLE

For the past year and a half, the United States has been embroiled in a contentious and arcane internal dispute over the correct interpretation of those portions of the 1972 ABM Treaty which pertain to the development and testing of futuristic or so-called "exotic" ABM systems. This controversy was precipitated in October, 1985, when the Reagan Administration announced with no advance notice or congressional consultations that the interpretation of the Treaty which successive U.S. administrations had upheld since 1972 was incorrect.

The debate on the reinterpretation issue has necessarily been legalistic. Treaties are, after all, the law of the land, and the President is charged with executing the law. Moreover, the Senate has a crucial constitutional role in treaty-making and thus has a direct interest in ensuring that treaties are accurately presented and faithfully upheld. If the President can unilaterally change Treaty obligations which were clearly understood and accepted by the Senate at the

time it consented to ratification, it dramatically alters the Senate's constitutional role as a co-equal partner in this area.

For these reasons, it is imperative that the Administration's case for the reinterpretation be subjected to a rigorous legal analysis. Some have accused those who do not accept the Administration's case for the reinterpretation of allowing "legalisms" to stand in the way of necessary progress in the Strategic Defense Initiative. Others have accused the Administration—in one columnist's phrase—of "lookin' fer loopholes" in the Treaty through what might be called "sharp practices."

I believe that it is important to put aside accusations as to motive and judge the facts as they stand. If the reinterpretation is legally correct, then our Nation has every right to proceed accordingly. But if it is not legally correct, then manipulating the law of the land is not acceptable.

Before beginning this legal analysis, there are, however, a few points I want to make about the broader policy context within which this issue must be debated.

First, I do not believe that the reinterpretation debate should be cast in terms of whether one is for or against the ABM Treaty. The Treaty was accepted in 1972 by the Nixon Administration and the United States Senate on the assumption first, that the Soviet Union would strictly observe its terms, and second, that significant reductions in strategic offensive arms would be accomplished within five years.

Neither expectation has been fulfilled. The Soviets have not restrained the relentless expansion of their strategic offensive forces. Their massive investment in strategic defenses (primarily air defenses)—while not a violation of the ABM Treaty—does contradict the spirit of the agreement; that is, that both sides recognized and accepted that there can be no shield against retaliation. And violations such as the Krasnoyarsk radar undermine the integrity of the agreement.

In light of these considerations, the Soviet Union must recognize that the U.S. commitment to the ABM Treaty cannot be deemed unalterable or open-ended—whether or not the traditional interpretation of the Treaty is upheld. If arms control or unilateral strategic modernization efforts (such as moving to mobile ICBMs) fail to restore stability to the strategic balance in the future, the United States may well have to deploy strategic defenses designed to protect its retaliatory forces and command, control and communications. Unless the ABM Treaty could be amended by mutual agreement to permit such deployments, this action would necessarily require the United States to exercise its right under the supreme national interest clause of the Treaty to withdraw on six months notice.

Certainly a U.S. decision to withdraw from the ABM Treaty would be enormously controversial at home and abroad. I am not counseling this course at this time. Nonetheless, the American public and our allies need to understand that if we cannot solve current strategic vulnerabilities through arms control or our own strategic programs, we may have no recourse but to consider developing some form of strategic defense.

Second, those who support the reinterpretation in the name of accelerating the SDI may be laboring under a fundamental misimpression. There is a strong case that the specific SDI early deployment system now favored by Secretary Weinberger cannot be developed or tested under either interpretation.

Finally, those who would cast this issue as a question of whether one is for or against Soviet violations of arms control agreements

miss the point: there are other, more honorable responses available to the United States. These include, first, insisting that the Soviets correct the violations; second, proportional U.S. responses; and third and last, abrogation of the agreement.

For 200 years, the United States has stood for the rule of law as embodied in our Constitution. The reinterpretation issue must be approached not with an eye toward near-term gains, but rather with a decent respect for the long-term interests of the rule of law and the continued integrity of this Constitution—that magnificent document whose 200th birthday we celebrate this year.

SECTION I: INTRODUCTION

A. Background

In 1972, the United States and the Soviet Union entered into a Treaty on the Limitation of Anti-Ballistic Missile Systems.<sup>1</sup> During the Senate ratification proceedings, Secretary of State Rogers set forth the Nixon Administration's summary perspective on the Treaty:

"Under this treaty, both sides make a commitment not to build a nationwide ABM defense. This is a general undertaking of utmost significance. Without a nationwide ABM defense, there can be no shield against retaliation. Both great nuclear powers have recognized, and in effect have agreed, to maintain mutual deterrence."

In broad outline, the Treaty prohibited deployment of all ABM systems except at two designated sites in each nation. At these sites, the ABM systems were limited to fixed, land-based components based on "then-current" technologies (i.e., ABM missiles, launchers, and radars). Research on these types of ABM components was not limited by the Treaty, but development and testing was confined to agreed test ranges.

The Treaty contained a further prohibition against development, testing, or deployment of sea-based, air-based, space-based, or mobile land-based ABM systems or components. In this report, these types of systems will be referred to collectively as "mobile/space-based" ABM systems. As with fixed, land-based ABM components, research was permitted on mobile/space-based ABM system. The distinction between fixed, land-based ABMs and mobile/space-based ABMs is a key aspect of the current Treaty reinterpretation controversy.

The Treaty has considerable current relevance because of its direct relationship to the Strategic Defense Initiative (SDI), initiated by President Reagan in 1983. A key element of SDI research involves the potential for a space-based ABM defense using futuristic technology, such as lasers or particle beams. Under current parlance, ABM components using "other physical principles" (i.e., physical principles or technologies "other" than those incorporated into ABMs in 1972) are known as "exotics" (and sometimes referred to as "future systems"). Another key issue in the current reinterpretation controversy involves the impact of the Treaty on development and testing of exotics.

The Reagan Administration initiated the SDI program under what is known as the "traditional" or "restrictive" interpretation of the ABM Treaty (hereinafter referred to as "the Traditional Interpretation"). Under the Traditional Interpretation, the Treaty has the following effect with respect to ABMs using "exotics" such as lasers:

TRADITIONAL INTERPRETATION OF THE TREATY

Research on all ABMs, including those urging exotic technologies, is permitted.

Testing and development of fixed, land-based exotics is permitted.

Testing and development of mobile/space-based exotics is prohibited.

Deployment of all exotics (whether fixed, land-based or mobile/space-based) is prohibited unless the parties agree to amend the Treaty.

The Reagan Administration developed an elaborate plan for a "treaty-compliant" SDI research program. This involved conducting SDI experiments and technology demonstrations in a manner which would not transgress the prohibitions under the Traditional Interpretation against the development of full-scale mobile/space-based ABM components or the testing of those components in an ABM mode.

#### B. Announcement of the reinterpretation

On October 6, 1985, Robert McFarlane, then the President's National Security Adviser, revealed that the Reagan administration was preparing to adopt a new interpretation of the Treaty, with dramatic implications for the conduct SDI. Appearing on *Meet The Press*, McFarlane announced that "... research involving new physical concepts ... as well as testing, as well as development indeed, are approved and authorized by the treaty. Only deployment is foreclosed ..."

McFarlane's announcement of a new reading of the Treaty appeared to open the door to unrestricted development and testing of the actual components of a space-based SDI system utilizing exotic components. It was based on a preliminary legal opinion which had been written the preceding week by Abraham Sofaer, the State Department Legal Adviser.

The main lines of the reinterpretation argument (hereinafter referred to as "the Reinterpretation" or "the Sofaer analysis") may be summarized as follows:<sup>3</sup>

#### REINTERPRETATION OF THE TREATY

The text of the Treaty is ambiguous. It prohibits deployment of mobile/space-based ABMs using exotics. Although it is possible to read the Treaty as also banning testing and development of ABMs using exotics, Sofaer maintains that the Treaty "can more reasonably be read to support a broader interpretation"—i.e., that the Treaty permits such development and testing.<sup>4</sup>

The record of the Senate ratification debate and other statements at or near the time of ratification support an interpretation of the Treaty that would permit testing and development of mobile/space based ABMs using exotics. Sofaer contends that this record "can fairly be read to support the so-called broader interpretation."<sup>5</sup>

The classified negotiating record supports the Reinterpretation. Sofaer contends that the negotiating record demonstrates that "although the United States delegates initially sought to ban development and testing of non-land-based systems or components based on future technology, the Soviets refused to go along, and no such agreement was reached."<sup>6</sup>

McFarlane's announcement, based on the Sofaer analysis, provoked a sharply critical response by Members of Congress, former ABM negotiators, allied leaders, and the Soviet government. Widespread suspicion was voiced from these quarters that the Reinterpretation had been fabricated to advance SDI to the threshold of deployment without amending or abrogating the ABM Treaty.

Although the White House noted the President's agreement with McFarlane's statement, the President decided on October 11, 1985 that the SDI program would continue for the indefinite future to be conformed to the Traditional Interpretation. This decision was formally announced by Secretary Shultz at a meeting of NATO par-

liamentarians in San Francisco on October 14.

#### C. Conflicting Administration Views

From the outset, Administration officials provided conflicting views as to the likely duration of the policy of adhering to the Traditional Interpretation. In his October 14 statement, Secretary Shultz declared that switching to the broader interpretation was "a moot point," since the President had reaffirmed that the SDI program "will continue to be conducted in accordance with a restrictive interpretation of the Treaty's obligations." Nonetheless, the Secretary's statement also noted that this policy reflected the Administration's assumption that SDI would be "consistently funded at the levels required"—thereby suggesting that were Congress to cut SDI funding significantly, the policy might be reconsidered. However, on October 17, White House spokesman Edward Djerejian declared that congressional funding for SDI "is not a condition for U.S. treaty interpretation."

On October 21, Sofaer told the House Foreign Affairs Committee that the reinterpretation issue "may have practical significance only when the SDI program has reached the point at which questions regarding the feasibility of strategic defense have been answered and engineering development, with a view to deployment, becomes a real option."<sup>7</sup> Sofaer apparently did not believe that this point would be reached at any time during the current administration. In response to a written question submitted by Senator Warner at a November 21 Armed Services Committee hearing, Sofaer commented on the possibility of legislation that would enact the Traditional Interpretation:<sup>8</sup>

"... such legislation is unnecessary. The President has affirmed that he intends to pursue the SDI research program as currently structured, which is consistent with the 'restrictive' interpretation. Should a future Administration seek to implement the broader interpretation, the Congress would have a voice in that decision." (Emphasis added.)

Other Administration officials, however, continued to publicly advocate an early switch to the more permissive position. For example, at a December 5, 1985 Armed Services Committee hearing, Richard Perle said, "If you restrict the program to the restrictive interpretation, it would so prejudice the prospect for success that it would become questionable, in my view, whether we should continue with the program at all."<sup>9</sup> However, at the same hearing, the Director of the SDI, Lt. Gen. Abramson, testified that it would be "several years" before the Traditional Interpretation would impose any cost or time delay penalties on the program. General Abramson explained that by this, he meant "the early 1990 timeframe."<sup>10</sup>

When hearings on the interpretation of the Treaty failed to establish a consensus in the Congress in support of the Reinterpretation, the Senate sought direct access to the negotiating record so that an independent judgment could be made on the issue. The State Department initially refused to provide the record, but relented in August, 1986. Under an arrangement negotiated with Secretary Shultz, all Senators and six cleared staff members have had access to the negotiating record in Room S-407 of the Capitol, a secure facility under the direct control of the Majority and Minority Leaders.

The ABM Treaty interpretation issue is a matter of intense concern to me, both as a member of the Senate and as Chairman of the Armed Services Committee. This issue goes to the heart of the Senate's constitu-

tional role in treaty-making. Furthermore, our Committee has jurisdiction over programs of the Department of Defense which are regulated under the Treaty, including SDI.

Over the last several months, I have devoted many hours to study of the Treaty, the ratification debate, and the negotiating record. I have been assisted in this review by Robert Bell, an arms control specialist on the staff of the Armed Services Committee. Mr. Bell has spent countless hours over the last several months researching these issues. In addition, I have been assisted in my legal analysis by Andrew Efron and Jeffrey Smith, who are both lawyers on the staff of the Armed Services Committee.

In recent weeks, the treaty reinterpretation issue has taken on a new sense of urgency. In the course of a February 3 National Security Council (NSC) meeting, Secretary Weinberger urged President Reagan to make immediate decisions on an early deployment of SDI, including authorizing the Defense Department to restructure SDI in accordance with the Reinterpretation.

#### D. Commitment to consultations

News reports of the February 3 discussion provoked deep concern in Congress and allied capitals. On February 6, I wrote the President expressing my concern that a decision to terminate the Administration's policy of observing the Traditional Interpretation without thorough consultations with Congress and our allies would provoke a profound constitutional confrontation. Faced with blunt warnings from allied leaders and other members of Congress, the Administration decided to postpone any imminent decision on this issue and to conduct additional research into such related issues as to what the Senate was told during the 1972 ratification proceedings and how the parties appeared to view the Treaty subsequent to its ratification.

On February 8, Secretary Shultz announced that prior to any final decisions, the Administration would engage in a "collaborative process" of consultations with Congress and our allies. At a February 24 meeting with Senate leaders, Ambassador Nitze and Assistant Secretary Perle provided further assurance that the new Administration studies (which were expected to be finished by the end of April) would be submitted to the Senate and Senators would be afforded an opportunity to review them and consult with the Administration before any final decisions were taken.

On March 9, I received a letter from Judge Sofaer in which he acknowledged that the analyses of the Senate ratification debate which he had previously submitted to the Senate did not cover the subject in full depth. He indicated that the new studies directed by the President would be thorough and comprehensive. I appreciate Judge Sofaer's candor and look forward to reviewing these studies when they are submitted to the Senate.

As a result of these developments, the Senate has both an opportunity and an obligation to make its views known on this issue in the course of the next several months. This report is intended to contribute to this process by examining the merits of the Reinterpretation. Sofaer's case for the Reinterpretation has been offered publicly in various places, including hearings before the Senate Armed Services Committee in 1985 and in the June, 1986 issue of the *Harvard Law Review*.<sup>11</sup>

The classified materials provided the Senate last August by the Department of State also include Sofaer's detailed analysis of the negotiating record, as well as brief re-

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views of the Senate ratification proceedings and subsequent practice.

#### E. Definitions

To recap, the following definitions will be used for purposes of simplicity in this report:

1. *Fixed, land-based:* ABM systems or components which are immobile and are designed for a ground-based mode.

2. *Mobile/space-based:* ABM systems or components which are sea-based, air-based, space-based, or mobile land-based.

3. *Exotics:* ABM systems or components which are: (a) based on "other physical principles" (i.e., physical principles other than those which were incorporated in ABMs at the time the Treaty was signed in 1972); and (b) capable of substituting for 1972-era ABM systems or components. (i.e., ABM missiles, launchers and radars).

4. *Then-current ABM systems or components:* ABM systems or components utilizing physical principles which were well known in 1972—i.e., ABM missiles, launchers, and radars.

5. *The Traditional Interpretation:* In its shortest form, the view that the development and testing of mobile/space-based exotics is prohibited under the Treaty.

6. *The Reinterpretation:* The view formulated by the current State Department Legal Adviser, Abraham Sofaer, which, in its shortest form, holds that the development and testing of mobile/space-based exotics is permitted under the Treaty.

#### F. Overview of report

Section II of this report summarizes the respective interpretations of the Treaty offered by the Traditional Interpretation and the Reinterpretation. Sections III and IV then examine the 1972 Senate hearings and debate on ratification of the ABM Treaty and the implications for current executive branch conduct of the Senate's understanding when it gave its advice and consent in 1972.

Within the next few days, I intend to release two additional reports which will address other important aspects of the reinterpretation issue. The first of these two reports will focus on the practice of the two parties after 1972 to determine whether this information sheds any useful light on their respective views of the meaning of the Treaty. The third and final report will state my conclusions with regard to the Treaty negotiating record. In the final report, I shall also revisit the Treaty text to read the document with the insight gained from the review of the Senate ratification debate, the parties' subsequent practice, and the negotiating record.

#### SECTION II: TWO DIFFERENT INTERPRETATIONS OF THE ABM TREATY

The Traditional Interpretation of the ABM Treaty is relatively straightforward: the Treaty expressly prohibits development and testing of mobile/space-based ABMs, and there is no exception for ABMs using exotics. The Reinterpretation is more complex, based upon the interrelationship of various articles in the text. This section summarizes the two theories.

##### A. The text of the treaty

The provisions of the 1972 ABM Treaty that bear on the question of exotic ABM systems and components include Articles II(1), III, IV, V(1), and Agreed Statement "D". The full text of the Treaty is set forth in Appendix 1.

#### ARTICLE II (1)

For purposes of this Treaty an ABM system is a system to counter strategic ballistic missiles or their elements in flight trajectory, currently consisting of:

(a) ABM interceptor missiles, which are interceptor missiles constructed and deployed for an ABM role, or of a type tested in an ABM mode;

(b) ABM launchers, which are launchers constructed and deployed for launching ABM interceptor missiles; and

(c) ABM radars, which are radars constructed and deployed for an ABM role, or of a type tested in an ABM mode.

**TRADITIONAL INTERPRETATION:** Article II defines the term "ABM system" generically as a system which has the function of countering strategic ballistic missiles. The definition then lists, as an illustration, the components "currently" in use at the time of the agreement. Because the clause listing the components is only illustrative, it does not limit the term "ABM systems" to those containing such components. It also means that the term implicitly covers future systems. Consequently, future ABM systems that might use different components (i.e., exotics) are within the definition.

**REINTERPRETATION:** Article II is ambiguous, but it can be read more reasonably to limit the definition to those components current at the time of the agreement, thereby excluding ABMs using components other than interceptor missiles, launchers, or radars (e.g., excluding exotic components).

#### ARTICLE III

Each Party undertakes not to deploy ABM systems or their components except . . . [for two designated fixed, land-based systems with specific limitations on missiles, launchers, and radars].

**TRADITIONAL INTERPRETATION:** Article III bans deployment of all "ABM systems" or their components except those expressly authorized at two designated sites. By using the term "ABM systems," which is broadly defined in Article II under the traditional view, the prohibition on deployment in Article III extends to all present and future (i.e., exotic) ABM systems and components.

**REINTERPRETATION:** Applying a narrow definition of ABM systems under Article II, the Reinterpretation then reads the ban on deployment in Article III as applying only to the three then-current components. Under this view, Article III does not establish any barrier to the deployment of exotics.

#### ARTICLE IV

The limitations provided for in Article III shall not apply to ABM systems or their components used for development or testing, and located within current or additionally agreed test ranges. Each Party may have no more than a total of fifteen ABM launchers at test ranges.

**TRADITIONAL INTERPRETATION:** Article IV limits all development and testing of fixed, land-based ABM systems or components to agreed test ranges. Using the traditional view's broad Article II definition of ABM systems, Article IV applies to exotics, as well as then-current, ABM systems, thereby restricting development and testing of exotics to the agreed test ranges. Since the Traditional Interpretation views Article V as banning the development or testing of mobile/space-based exotics (see discussion below), the only exotics which can be developed or tested are fixed, land-based exotics, and these can only be developed or tested at the agreed test ranges.

**REINTERPRETATION:** Applying a narrow definition of ABM systems under Article II, Article IV only concerns testing and development of then-current components. As a result, the development and testing of exotics (whether fixed, land-based or mobile/space-based) is not restricted to agreed test ranges, and exotics may be developed or tested anywhere.

#### ARTICLE V (1)

Each Party undertakes not to develop, test, or deploy ABM systems or components which are sea-based, air-based, or mobile land-based.

**TRADITIONAL INTERPRETATION:** Applying the Traditional Interpretation's broad Article II definition of ABM systems, Article V bans the development, testing, or deployment of all mobile/space-based "ABM systems," including exotics.

**REINTERPRETATION:** Consistent with the Reinterpretation's narrow reading of the definition of ABM systems, the prohibitions in Article V(1) apply only to ABM systems using "then-current" components. As a result, Article V does not prohibit the development, testing, or deployment of mobile/space-based exotics.

#### AGREED STATEMENT "D"

In order to insure fulfillment of the obligation not to deploy ABM systems and their components except as provided in Article III of the Treaty, the Parties agree that in the event ABM systems based on other physical principles and including components capable of substituting for ABM interceptor missiles, ABM launchers, or ABM radars are created in the future, specific limitations on such systems and their components would be subject to discussion in accordance with Article XIII [the Standing Consultation Commission] and agreement in accordance with Article XIV of the Treaty [governing amendments].

**TRADITIONAL INTERPRETATION:** Agreed Statement D complements Article III (which bans deployment of all ABM systems, including exotics, except for fixed, land-based systems expressly permitted at the two specified deployment sites) and Article IV (which permits testing and development of fixed, land-based exotics at agreed test ranges). Agreed Statement D provides that if such testing and development leads either side to propose deployment of such exotics, the parties should negotiate the limitations which would govern such deployments. If, however, there is no agreement on appropriate amendments to the Treaty, the deployment of exotics remains prohibited.

**REINTERPRETATION:** Agreed Statement D is ambiguous. The Traditional Interpretation results in a reading of this provision that duplicates other parts of the Treaty (i.e., the ban on deployment of exotics in Article III and the procedure for discussing and agreeing upon amendments in Article XIII and XIV). To address the ambiguity and give independent meaning to this provision, it should be interpreted in light of the fact that it is the only part of the treaty that expressly mentions exotics. Therefore, Agreed Statement D should be read as banning deployment of all exotics (including fixed, land-based and mobile/space-based) unless the parties agree to amendments permitting such deployment. Moreover, because it only addresses deployment, it should be read as permitting testing and development of all exotics, including mobile/space-based as well as fixed, land-based.

##### B. Principles of treaty interpretation

International law has developed a series of principles for treaty interpretation, the best expression of which is the Vienna Convention on the Law of Treaties.<sup>12</sup> The U.S. has signed the Convention, but has not yet ratified it. The relevant articles are quoted below:

#### ARTICLE 31

##### General Rule of Interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary mean-



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under these treaties. In effect, the Reagan administration is telling the Senate not only that the executive branch is free to ignore the meaning of the treaty as originally described in the Senate of the United States, but also that other nations who are party to such treaties can disregard what the executive branch told the Senate at the time of ratification.

I am certain that this novel doctrine will receive close scrutiny during the hearings before the Foreign Relations Committee and the Judiciary Committee.

Mr. President, before I present the results of my review of 1972 Senate ABM Treaty ratification proceedings, I believe that a few comments are in order about the overall context in which the Senate must consider the ABM reinterpretation issue.

First, I do not believe that the reinterpretation debate should be cast in terms of whether one is for or against the ABM Treaty. The treaty was accepted in 1972 by the Nixon administration and the United States Senate on the assumption, first, that the Soviet Union would strictly observe its terms, and second, that significant reductions in strategic offensive arms would be accomplished within 5 years.

Neither expectation has been fulfilled. The Soviets have not restrained the relentless expansion of their strategic offensive forces. Their massive investment in strategic defenses, primarily air defenses—while not a violation of the ABM Treaty—does contradict the spirit of the agreement; that is, that both sides recognized and accepted in 1972 that there can be no shield against retaliation. And violations such as the strategic Krasnoyarsk radar undermine the integrity of the agreement.

In light of these circumstances and considerations, the Soviet Union must recognize that the United States commitment to the ABM Treaty cannot be deemed unalterable or open-ended—whether or not the traditional interpretation of the treaty is upheld. If arms control or unilateral strategic modernization efforts—such as moving to mobile ICBM's—fail to restore stability to the strategic balance in the future, the United States may well have to deploy strategic defenses designed to protect its retaliatory forces and command, control and communications. Unless the ABM Treaty could be amended by mutual agreement to permit such deployments, which would require approval of both parties, this action would necessarily require the United States to exercise its right under the supreme national interest clause of the treaty to withdraw on 6 months notice.

Certainly a U.S. decision to withdraw from the ABM Treaty would be enormously controversial at home and abroad. I am not counseling this course at this time. Nonetheless, the American public and our allies need to understand that if we cannot solve

current strategic vulnerabilities through arms control or our own strategic programs, we may have no recourse but to consider deploying some form of strategic defense, in the future.

Second, those who support the reinterpretation of the ABM Treaty in the name of accelerating the SDI may be laboring under a fundamental and erroneous misimpression. There is a strong case that the specific SDI early deployment system now favored by Secretary Weinberger cannot be developed or tested under either interpretation.

This requires a rather complicated explanation which I will not go into at this time, but it is not at all certain, in fact I would say the evidence is leaning against it, that even the broad interpretation of the treaty would permit the testing and development of the so-called space-based kinetic-kill system that is now apparently favored for early deployment.

Finally, those who would cast this issue as a question of whether one is for or against Soviet violations of arms control agreements miss the point: there are other, more honorable responses available to the United States. These include, first, insisting that the Soviets correct the violations; second, proportional U.S. responses; and third and last, abrogation of the agreement.

For 200 years, the United States has stood for the rule of law as embodied in our Constitution. The reinterpretation issue must be approached not with an eye toward near-term gains, but rather with a decent respect for the long-term interests of the rule of law and the continued integrity of this Constitution—that magnificent document whose 200th birthday we celebrate this year.

Mr. President, the record of the ratification proceedings before the U.S. Senate in 1972 supports, in my view, the following conclusions about the scope of the treaty.

First, executive branch witnesses clearly stated that development and testing of mobile space-based exotics was banned while development and testing of fixed land-based exotics was permitted. Key Members of the Senate, including Senators Henry Jackson, Barry Goldwater, John Sparkman, and James Buckley, were directly involved in the dialog and debate concerning the implications of the treaty which the record indicates they clearly understood to ban testing and development of mobile space-based exotics. I think a few examples of this are very important and in order here.

The question of exotics was raised in the first Senate hearing that considered the treaty. Senator Goldwater, in a question for the record to Secretary of Defense Laird, noted that he had “long favored” moving ahead with space-based ABM's capable of conducting boost-phase intercepts using “shot, nukes (sic.), or lasers,” and asked

whether it was correct that nothing in the treaty “prevents development to proceed in that direction.”

The written reply from DOD distinguishes between development of fixed, land-based ABM's—which is permitted by the treaty—and this is extremely important, very complicated, but it is the key to this overall consideration—and development of mobile/space-based ABM's, which is prohibited. The reply from Secretary Laird expressly related these provisions to lasers, which in our terms today would be considered an “exotic” ABM component.

#### REPLY OF SECRETARY LAIRD TO QUESTION FROM SENATOR GOLDWATER

With reference to development of a boost-phase intercept capability or lasers, there is no specific provision in the ABM Treaty which prohibits development of such systems. There is, however, a prohibition on the development, testing, or deployment of ABM systems which are space-based, as well as sea-based, air-based, or mobile land-based. The U.S. side understands this prohibition not to apply to basic and advanced research and exploratory development of technology which could be associated with such systems, or their components. There are no restrictions on the development of lasers for fixed, land-based ABM systems. The sides have agreed, however, that deployment of such systems which would be capable of substituting for current ABM components, that is, ABM launchers, ABM interceptor missiles, and ABM radars, shall be subject to discussion in accordance with Article XIII (Standing Consultative Commission) and agreement in accordance with Article XIV (amendments to the treaty).

This statement is particularly significant because it embodies a formal, written executive branch response. It clearly sets forth the traditional interpretation of the treaty with respect to exotics, permitting development, and testing only in a fixed, land-based mode. The reply makes it clear that mobile/space-based exotics are subject to the comprehensive ban on development, testing, and deployment, with the understanding—as stated in Secretary Laird's reply—that the treaty only permits “basic and advanced research and exploratory development.”

It is also noteworthy that the reply clearly links the ban on development of mobile/space-based ABM laser systems to article V of the treaty. Article V contains a comprehensive ban on mobile/space-based, ABM systems. Secretary Laird's express linkage between mobile/space-based exotics and article V directly refutes the reinterpretation's analysis of the treaty's text, which asserts that article V applies only to components existing in 1972; that is, missiles, launchers, and radars.

The detailed executive branch reply was omitted from an October 30, 1985, analysis of the ratification debate submitted to the Senate Armed Services Committee by Sofaer on November 21, 1985. This omission was brought to the attention of the committee on January 6, 1986, in a letter from John

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Rhineland, the legal adviser to the U.S. SALT I delegation. In a subsequent analysis of the ratification debate published in the June 1986 Harvard Law Review, Sofaer conceded in a footnote that the DOD reply to Goldwater supports the traditional interpretation.

The second example is an exchange between Senator Henry Jackson and DOD's Director of Research and Engineering which confirmed the treaty's ban on testing and development of mobile/space-based exotics. During the Senate debate on the SALT I accords, which included the ABM Treaty, the late Senator Henry Jackson, a senior member of the Armed Services Committee, conducted a rigorous inquiry into the agreements, with a profound impact on the conditions of Senate acceptance. From the outset, he exhibited a keen sensitivity to the issue of exotics by focusing on laser ABM's. For example, just 5 days after the treaty's signing, he made a statement sharply critical of the Army's reputed cancellation of a research contract involving laser ABM's.

When Secretary Laird came before the committee on June 6, 1972, he quickly assured Senator Jackson that no such contract had been canceled. When Senator Jackson asked about ABM Treaty limits in this area, Secretary Laird gave a general reply—noting only that "research and development can continue, but certain components and systems are not to be developed"—without getting into the distinction between fixed, land-based systems and mobile/space-based systems.

Senator Jackson pursued that distinction in June 22, 1972, hearing during testimony by Dr. John Foster, Director of Defense Research and Engineering, and Lt. Gen. Walter Leber, the program manager of the Army's Safeguard ABM system. This hearing involved a careful discussion of treaty's limits regarding development of ABM's using exotics, with a specific focus on the distinction between fixed, land-based systems and mobile/space based systems.

Senator Jackson began by noting that there were limitations in the treaty on lasers and then asked whether the agreement prohibited land-based laser development? Dr. Foster replied, "No sir; it does not." The text of the printed hearing reads as follows:

#### LASER ABM SYSTEM

Senator JACKSON. Article V says each party undertakes not to develop and test or deploy ABM systems or components which are sea based, air based, space based or mobile land based.

Dr. FOSTER. Yes sir, I understand. We do not have a program to develop a laser ABM system.

Senator JACKSON. If it is sea based, air based, space based or mobile land based. If it is a fixed, land-based ABM system, it is permitted; am I not correct?

Dr. FOSTER. That is right.

Senator JACKSON. What does this do to our research—I will read it to you: section 1

of article 5—this is the treaty: "each party undertakes to develop"—it hits all of these things—"not to develop, test or deploy ABM systems." You can't do anything; you can't develop; you can't test and finally, you can't deploy. It is not "or".

Dr. FOSTER. One cannot deploy a fixed, land-based laser ABM system which is capable of substituting for an ABM radar, ABM launcher, or ABM interceptor missile.

Senator JACKSON. You can't even test; you can't develop.

Dr. FOSTER. You can develop and test up to the deployment phase of future ABM system components which are fixed and land based. My understanding is that you can develop and test but you cannot deploy. You can use lasers in connection with our present land-based Safeguard system provided that such lasers augment, or are an addendum to, current ABM components. Or, in other words, you could use lasers as an ancillary piece of equipment but not as one of the prime components either as a radar or as an interceptor to destroy the vehicle.

When Senator Jackson suggested that even research on ABM lasers might be prohibited, Dr. Foster said, "No." Interposed between Senator Jackson's question and Dr. Foster's answer is the following insert for the RECORD:

Article V prohibits the development and testing of ABM systems or components that are sea-based, air-based, space-based, or mobile land-based. Constraints imposed by the phrase "development and testing" would be applicable only to that portion of the "advanced development stage" following laboratory testing, i.e., that stage which is verifiable by national means. Therefore, a prohibition on development—the Russian word is "creation"—would begin only at the stage where laboratory testing ended on ABM components, on either a prototype or bread-board model.

The importance of this submission as an authoritative statement of Nixon administration policy is underscored by the original transcript of this hearing which is currently maintained in the Armed Services Committee archives. This transcript reveals two key points. First, Dr. Foster pledged to submit the insert after Senator Jackson had declared that "we had better find out" exactly how the treaty applied to research and development in this area. Second, the transcript reveals that Dr. Foster declared that in order to clarify this issue, the submission would reflect a detailed review of the negotiating record.

In other words, Dr. Foster promised Senator Jackson before he gave his written answer that he would go back and review the negotiating record. And this is the top man in the scientific arena in the Department of Defense.

The unedited exchange reads as follows:

Dr. FOSTER. I think you can engage in research or development of laser land-based ABM systems; you cannot deploy them as a kill mechanism against ICBMs.

Senator JACKSON. Well, that is something we had better find out about it. I would [sic.] you would—

Dr. FOSTER. I would be glad to go through the record, Senator Jackson, in some detail and try to clarify this.

As is the normal practice in editing congressional hearings, the comments about what was to be submitted for the record was deleted and replaced by the actual submission.

Several observations about the extensive exchange between Senator Jackson and Dr. Foster deserve emphasis. First, this exchange in the record includes a formal, written submission, which provided the executive branch with an opportunity to prepare an official coordinated statement after review of the negotiating record. As such, it clearly represents an authoritative statement of the administration's position. Second, the fact that the statement refers to article V—the treaty's ban on testing, development, and deployment of mobile/space-based ABM's—in the context of lasers again refutes the reinterpretation's premise that article V does not apply to ABM's using exotics.

The Jackson-Foster exchange directly contradicts the reinterpretation of the treaty. The credibility of the Sofaer analysis is further undermined by the distorted manner in which it treats this crucial dialog between a leading Senator and high-level Nixon administration witness. For example:

The version of this extensive Jackson/Foster exchange presented in Sofaer's October 1985 analysis of the ratification proceedings and in Sofaer's June 1986 Harvard Law Review article advocating the reinterpretation is greatly abbreviated. While the reinterpretation acknowledges that Dr. Foster's comments support the traditional interpretation, the only portion of the entire exchange which it cites is the following:

Dr. FOSTER: One cannot deploy a fixed, land-based laser ABM system which is capable of substituting for an ABM radar, ABM launcher, or ABM interceptor missile . . . You can develop and test up to the development phase of future ABM system components which are fixed and land based.

Dr. Foster's explicit confirmation that development and testing of space-based, or mobile land-based laser ABM's was prohibited is omitted in the reinterpretation. There is also no mention in the reinterpretation of Foster's written submission nor its linking the discussion of limits on laser ABM's to article V.

Dr. Foster, a Presidential appointee, was the highest ranking technical official, and third-ranking civilian in the Defense Department. He had served in his position since 1965. Nonetheless, the Sofaer analysis tries to disparage his testimony by stating Foster was "not involved in the drafting or negotiation of the treaty." The suggestion that the Director of Defense Research and Engineering would not have acquainted himself thoroughly with the treaty's effect on programs under his supervision prior to representing the administration before the Armed Services Committee is absurd. At any rate, as discussed above, the transcript con-

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firms that Dr. Foster's written submission was based on a detailed review of the negotiating record.

I also find it interesting, Mr. President, that in making his analysis, Judge Sofaer has not to the best of my knowledge interviewed those who were responsible for negotiating this treaty with the exception of Paul Nitze, a very respected individual who works for this administration. So by virtue of his reference that Dr. Foster was not a negotiator you would think, if this was important, there would have at least been interviews with those who were negotiators. But we have had this reinterpretation rendered with such interviews not having occurred even to date, with the exception of Paul Nitze.

Sofaer's account of the exchange excises Senator Jackson's half of this dialog in its entirety. As a result, anyone reading this analysis would not know that Senator Jackson had acquired a detailed understanding of the treaty limits in this area or, indeed, that the Senator took the lead in drawing out of the witness explicit confirmation of these restrictions.

As a result of this omission, the only mention of Senator Jackson in Sofaer's October 1985 analysis of all of the Armed Services Committee's ratification hearings is in a discussion of a hearing on July 19, 1972. In a summary comment on Senator Jackson's July 19 statements, the reinterpretation concludes: "Fairly read, Senator Jackson's comments do not address future systems."

Mr. President, this is perhaps the most egregious omission and misinterpretation that I have come across in the entire record.

By omitting the extensive June 22 Jackson/Foster exchange on laser ABM's—as well as other instances when Senator Jackson queried witnesses on the question of laser ABM's, including a highly classified session on June 26 with CIA Director Richard Helms—the reinterpretation is then able to claim in a paragraph summarizing all congressional hearings during the ratification proceedings that "Senator Jackson's comments do not appear to address future systems." Sofaer's assertion that Senator Jackson never addressed the question of limits on laser ABM's during the entire Senate debate on the ABM Treaty is flatly and unequivocally contradicted by the record of the debate.

In the third example is a July 19 exchange with Senator Jackson, in which General Palmer confirmed that the JCS supported the limitation under which testing and development of exotics was restricted to fixed, land-based systems. The record of this Armed Services Committee hearing not only repudiates the claim that Senator Jackson did not address future systems, it also contains a crucial passage confirming the Joint Chiefs' understanding of the difference between fixed, land-based and mobile/space-based exotics in terms of

the restrictions on development and testing.

This hearing involved an extensive exploration of treaty's limits on exotics, focusing on laser ABM's. The key exchange occurred between three Senators: Goldwater, Jackson, and Dominick, and three executive branch witnesses: General Ryan, Chief of Staff of the Air Force, General Palmer, Acting Chief of Staff of the Army, and Lieutenant General Leber, project manager of the Safeguard ABM Program. This exchange covers seven pages of the printed hearing. During this exchange, the word "laser" was used 13 times, descriptions of or references to lasers were made 6 other times, and the phrase "futuristic systems" was mentioned 3 times.

During the same hearing, Senator Jackson also questioned the witness about General Palmer's broad statement that the treaty "does not limit R&D on futuristic systems." Senator Jackson, expressing concern about the generality of this response, drew the witnesses' attention to article V's prohibition on development of mobile ABM systems. General Ryan noted the distinction between permissible development of fixed, land-based systems and the prohibited development of mobile/space-based systems. Finally, General Palmer provided an authoritative statement on the prohibition on development of mobile/space-based exotics.

How anyone could have omitted this in a presentation about the Senate record escapes my own sense of logic. I will not read it in its entirety, but it is included in my full report which I will put in the RECORD.

Sofaer's analysis of this discussion omits Palmer's crucial closing comment that the JCS were aware of the limits on development and testing of laser ABM's, had agreed to them, and recognized that this was a fundamental part of the final agreement. Thus, the record demonstrates that Sofaer's assertion that Senator Jackson did not address the question of exotics during the ratification debate is a complete and total misrepresentation. It also underscores the inadequacy of its analysis by its omission of this additional, and authoritative, confirmation that the treaty banned the development and testing of all but fixed, land-based exotics.

It is also noteworthy that Senator Jackson and the executive branch witnesses clearly cited the prohibition on testing and development of mobile/space-based systems in article V of the treaty as the authority for the prohibition on testing and development of missile/space based ABM using exotics. This further undermines the reinterpretation's analysis of the treaty's text in which it asserts that article V should not be read as applying to mobile/space-based exotics.

Mr. President, the reinterpretation is based on two categories of incomplete, imprecise, or general state-

ments—those which indicate that exotics cannot be deployed and those which indicate that R&D on lasers is permitted. However, each of these statements can be read as consistent with either the traditional interpretation or the reinterpretation. This is extremely important, because it is the heart of the case for reinterpretation so far as the Senate record is concerned.

In the reinterpretation, much is made of brief statements to the effect that the deployment of exotics is banned. For example, during his May 26, 1972, press conference, Ambassador Smith said, "future systems . . . will not be deployable unless this treaty is amended." The reinterpretation reads this statement as supportive of its case, arguing that, "It is unlikely that Ambassador Smith, the negotiator of the treaty, would have referred to only a ban on deployment if he had meant testing and development were banned as well."

Smith's statement that the deployment of exotics is banned is, however, fully consistent with the traditional interpretation. Nonetheless, the reinterpretation suggests that since Smith cited the ban on deployment of exotics but omitted any mention of a ban on their development or testing, then he must have believed that the treaty gave a green light to such activities; that is, that he would have gone on to say, had he voiced his opinion on this issue, that the treaty permits the development and deployment of all exotics. This is a very important part of the argument.

In short, the reinterpretation presumes that if Smith had believed that the traditional interpretation had been agreed to he would not have said simply that "future systems . . . will not be deployable unless this treaty is amended"—he would have said that "future systems will not be developed, tested, or deployed unless this treaty is amended."

There are three major problems with the logic upon which this analysis is based. First, the Smith statement is true and accurate on its face because under either interpretation deployment of future systems—that is, exotics—is banned. Second, it attempts to build a major case on what was not said. Third, if Smith had said what the reinterpretation postulates he should have said, he would have been wrong. Why? Because under both the traditional interpretation and the reinterpretation, the development and testing of fixed, land-based exotics is permitted. Development or testing of mobile/space-based exotics is, of course, banned under the traditional interpretation.

In other words, if Ambassador Smith had said exactly what the reinterpretation theory infers he should have said he would have been incorrect, because he would have been including land-based and mobile-based systems

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when one was treated differently from the other.

Under the logic of the reinterpretation, to prevent his remarks from being distorted in the future and, at the same time, ensure accuracy, Smith would have had been compelled to turn his brief sentence into something resembling the following. This is not Ambassador Smith speaking. This is my interpretation of what he would have had to say if he were going to avoid reinterpretation of his remarks 15 minutes later and if he were going to be entirely accurate.

Future systems (i.e., exotics—whether fixed, land-based or mobile/space-based—will not be deployable unless the treaty is amended. Future fixed, land-based exotics may be developed and tested, but only at the agreed test ranges as established under Article IV. Future mobile/space-based exotics may not be developed or tested at all in accordance with Article V.

Mr. President, I am not certain that either the people listening or those at a news conference would have sat still long enough to hear that every time there was a discussion of banning the deployment of exotics.

In summary, the assertion by the reinterpretation that a speaker's belief may be inferred from words he did not utter is illogical. The fact that the reinterpretation's conclusions as to the Senate ratification debate rely so heavily upon such statements reveals the flimsiness of its case.

The record of the Senate proceedings does not support Sofaer's assertion that the record of the Senate ratification proceedings on the ABM Treaty and statements made at or near the ratification period "can be fairly read to support the so-called broader interpretation." On the contrary, the record of these proceedings makes a compelling case for the opposite conclusion: that the Senate was presented with a treaty that prohibited testing or development of mobile/space-based exotics; both the proponents and opponents of the treaty understood the agreement to have this effect; and there was no challenge to this understanding in the course of the Senate's approval of the treaty.

In summary, I have examined the reinterpretation's analysis of the Senate ratification proceedings and found its conclusions with respect to this record not to be credible. I have concluded that the Nixon administration presented the Senate with the traditional interpretation of the treaty's limits on mobile/space-based exotics. I have also concluded that the Senate clearly understood this to be the case at the time it gave its advice and consent to the ratification of the treaty. In my judgment, this conclusion is compelling beyond a reasonable doubt.

This finding at this juncture does not address all issues raised by the reinterpretation. In the two succeeding reports, I will examine the issues of subsequent practice and the negotiating record, and any final judgments

must incorporate those assessments. Nonetheless, the findings that the Senate approved the ABM Treaty on the basis of its clear understanding, the acceptance of the traditional interpretation has serious ramifications for executive branch conduct. I would like to address these implications in closing my remarks.

Mr. President, in recent weeks, the State Department has raised a new theory, apparently pleading its case in the alternative; that is, the first part of the case is "the Senate was given the broad interpretation;" the second part of the case is, "just in case it was not given the broad interpretation here is the way we view it."

The State Department has argued that regardless of whether the ratification proceedings support the reinterpretation or broad interpretation, executive branch testimony presented to the Senate during the treaty-making process can be disregarded because it "has absolutely no standing" with the Soviets. In my opinion, this argument is incorrect in the context of the ABM Treaty, and is squarely in conflict with the constitutional role of the Senate.

Recent Soviet statements indicate that they now consider themselves bound by the traditional interpretation. For example, in an October 19, 1985, article in Pravda, Marshall Sergei Akhromeyev, the Chief of the Soviet General Staff, stated: "Article V of the Treaty absolutely unambiguously bans the development, testing, and deployment of ABM systems or components of space or mobile ground basing, and, moreover, regardless of whether these systems are based on existing or 'future' technologies."

The Reagan administration has not argued that the Soviets do not now claim to be bound by the traditional interpretation. Rather, the administration's position—as stated by Judge Sofaer—is that, "Only after the United States announcement of its support for the broader interpretation in October 1985 did the Soviet Union begin explicitly to articulate the restrictive interpretation."

Since the Soviets clearly agree with the traditional interpretation, the State Department's suggestion that statements made by U.S. officials during ratification proceedings have no standing with the Soviets is a rather curious, if not bizarre, argument. Let us look just for the purpose of discussion at the flip side of this interesting legal question. Let us assume for the purpose of this discussion that the Soviets were now taking the opposite position.

Let us assume that they were asserting now that U.S. statements during the ratification proceedings had "no standing" with them.

In other words, if hypothetically the Soviets took the position the State Department is taking, would the United States have any basis in international law for relying on the statements to

the Senate if we were insisting that the Soviets comply with the traditional view?

As a matter of international law, the actions of the parties, including their statements, provide an important guide to the meaning of a treaty. As Lord McNair notes in his classic treatise, *The Law of Treaties*, "when there is a doubt as to the meaning of a provision or an expression contained in a treaty, the relevant conduct of the parties after conclusion of the treaty (sometimes called the 'practical construction') has a high probative value as to the intention of the parties at the time of its conclusion."

Furthermore, he goes on to state, quoting again "[w]hen one party to a treaty discovers that other parties to a treaty are placing upon it an interpretation which in the opinion of the former it cannot bear, and it is not practical to secure agreement upon the matter, the former party should at once notify its dissent to the other parties and publish a reasoned explanation of the interpretation which it places upon the term in dispute." This is similar to the proposition under U.S. domestic law, that "if one party knows or has reason to know that the other party interprets language in a particular way, his failure to speak will bind him to the other party's understanding." Although not necessarily binding as a matter of international law, the failure to object to a publicly announced interpretation by another party to a treaty is clearly relevant to interpreting the treaty and to the treaty's meaning.

In the case of the ABM Treaty, these principles taken on even greater significance in view of attendance by Soviet officials at the Senate hearings on the agreement. It is very interesting that Senators Goldwater and Jackson noted the presence of one such Soviet official—who was apparently a regular attendee—during an extensive discussion with Nixon administration officials during a July 19 Armed Services Committee hearing that dealt at length and in great detail with the specific question of the treaty's limitations in the area of laser ABM's, exactly the point we are debating now. Even if the presence of Soviet observers had not been noted for the record—which it was—it is obvious that the Soviets, who understand how our treaty-making process works, monitored the proceedings and reviewed the public records. Based on their clear awareness of the interpretation being presented to the Senate, if the Soviets chose to enter into the treaty and have the treaty go into force without raising an objection, the United States would have had a very strong basis in law for insisting on the original meaning as presented to the Senate—particularly if the Soviets waited until 15 years later to undertake a different view of the treaty.



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Aside from the immediate issue of the ABM Treaty, it is contrary to the long-term interests of the United States to assert that statements made to the Senate have no standing with other parties to a treaty. The international community is well aware of the constitutional role of the Senate in the treaty-making process, and they are on notice that the executive branch explains treaties to the Senate during the ratification proceedings. It is to our national advantage to ensure that such authoritative explanations remain available as powerful evidence of a treaty's meaning in the event of an interpretative dispute among nations.

By asserting that the executive branch may now disregard the views of those who spoke for the Nixon administration and those who debated the issue in the Senate, the State Department is arguing, in effect, that administration witnesses need not accurately reflect the executive's understanding of a treaty; instead, they are free to keep that understanding a secret and may indeed mislead the Senate into consenting to a treaty which has a secret interpretation different from the meaning presented to the Senate. This line of argument has profound implications for the legislative process in general and the constitutional role of the Senate in particular.

Executive branch statements to the Senate during hearings on a proposed treaty may provide important evidence on issues of treaty interpretation in the international arena. They fill an even more important role, however, in our constitutional system, and this should not be overlooked. Such statements are an integral part of the making of a treaty, often shaping its content, and well-known to all parties to the proposal.

Under article II, section 2, clause 2 of the United States Constitution, the Presidential power to make treaties is subject to the requirement for advice and consent by two-thirds of the Senators present. Article VI, paragraph 2 of our Constitution provides that treaties are the supreme law of the land, which results in giving treaties the same force and effect as legislation enacted after action by both Houses of Congress.

Louis Henkin, one of the leading constitutional authorities in this field, and I understand he is testifying before the Foreign Relations Committee today, has noted that "although treaty making has often been characterized as an executive function (in that special sense in which the conduct of foreign relations is executive), constitutional writers have considered the making of treaties to be different from other exercises of Presidential power, principally because of the Senate's role in the process, perhaps too because treaties have particular legal and political qualities and consequences."

Hamilton, in *The Federalist* (No. 75), clearly illustrated the intent of the Framers that treaty making be a shared power between Congress and the President, based on mutual trust.

Madison also took the position that "there are sufficient indications that the power of treaties is regarded by the Constitution as materially different from mere executive power, and as having more affinity to the legislative than to the executive character."

The Senate has played a vital role in numerous treaty negotiations, through means such as the process of confirming negotiators, statutory requirements for congressional consultation during the negotiations process, and informal discussions. Under current practice, when a proposed treaty is submitted, the Senate may consent to the treaty, withhold its consent—either expressly or through inaction—or approve it with conditions.

Because the Senate is an active participant in the making of the treaty, the hearings and debates are a vital source of information as to what the treaty means. The nature of the issue and the testimony of executive branch witnesses may lead the Senate to attach conditions or forego conditions, if there is an authoritative statement as to the meaning of a provision.

The position of the State Department, I hope would be reexamined, because this position sends a clear message to the Senate: you cannot rely on our representations as to the meaning of a treaty. The adverse consequences of this proposition extend far beyond the issues at hand regarding the ABM Treaty. Our treaty relationships involve not only arms control matters, but also trade and business matters affecting the economic well-being of our Nation. We cannot ask the public to support proposed treaties if the executive takes the position that uncontradicted formal representations by senior officials are irrelevant as to the meaning of a treaty.

Because treaties are the supreme law of the land, the position of the State Department, if accepted by the executive branch, would compel the Senate to incorporate into its resolution of consent an "amendment" or "understanding" for every explanation given by an executive branch witness lest it be disavowed as "unilateral" after ratification. We would have to have so many understandings and conditions that the treaty would have to be negotiated all over again between the parties. Treaties so laden would eventually sink under their own weight. It would be extremely difficult to achieve bilateral agreements, and virtually impossible for the United States to participate in multilateral treaties. In addition, the Senate would feel compelled to request in each case a complete record of the negotiating history in order to ensure that no secret understandings would emerge contrary to assurances given to the Senate.

In short, in an effort to save the interpretation by asserting that executive branch statements to the Senate in 1972 are essentially meaningless, the State Department is risking a serious constitutional confrontation involving the executive branch and Congress that would go far beyond this matter. It would be a mistake for the executive branch to compound the problem further by asserting that the Senate has no role to play with respect to the meaning of treaties.

As a general proposition, the views of the executive on the interpretation of a treaty normally receive great deference as well they should, from the Congress. Application of that principle in terms of the meaning presented to the Senate by the executive branch at the time of ratification leads to an interpretation that mobile/space-based exotics may not be developed or tested. Under the reinterpretation, such testing and development is permitted. In this situation, many in the Senate may be inclined to apply the classic line of cross-examination to the executive branch: "Should we believe what you are telling us now or should we believe what you were telling us back then?"

The Senate has the right to presume that executive branch witnesses are informed and truthful in their testimony, particularly when it comes to the Senate's constitutional role as a participant in the treaty-making process. The State Department's assertion that the executive, in effect, may mislead the Senate as to the meaning of a treaty has the unfortunate effect of directly challenging the Senate's constitutional role. This effect could carry over and may well produce a congressional backlash through its exercise of the power of the purse and the power to raise and support armies in a manner that would give effect to the original meaning of the treaty as presented to the Senate.

In conclusion, Mr. President, the Senate was clearly informed by the executive branch that the ABM Treaty, prohibits testing and development of mobile/spaced-based ABM's using exotics. This was an issue which key Senators viewed as a matter of significance, and which was directly addressed by the executive branch during the treaty-making process in statements to the Senate. These circumstances raise a number of possibilities with respect to the significance of other evidence as to the meaning of the treaty. There are three distinct possibilities here.

First, if the negotiating record and evidence of subsequent practice by the parties supports the traditional interpretation, the issue would be beyond question. The traditional interpretation would apply. I will be looking at those two parts of this overall record in the next few days.

Second, if the negotiating record and evidence of subsequent practice is ambiguous or inconclusive, there would

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ing to be given to the terms of the treaty in their context and in the light of its object and purpose. (Emphasis added.)

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (Emphasis added.)

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 31 codifies the customary international law principle that a treaty is to be interpreted as a whole and in "light of its object and purpose." Lord McNair, among the most respected scholars in this field, has written:<sup>12</sup>

"Closely connected with the primary duty of seeking to ascertain, and giving effect to, the common intention of the parties is the duty to bear in mind what may be called the overall aim and purpose of the treaty . . . Thus in the Advisory Opinion upon the Competence of the International Labour Organization to Regulate the Personal Work of Employers, the Permanent Court found no difficulty in holding that inability to make such regulations was 'clearly inconsistent with the aim and the . . . scope of Part XIII' [of the Treaty of Versailles], and that if any such limitation 'had been intended, it would have been expressed in the Treaty itself.' To the same principle may be related the duty to construe a treaty as a whole and not to focus attention upon any of its provisions in isolation. There is ample evidence of this practice."

Article 31 (b) also provides that the "subsequent practice in the application of the treaty . . . shall be taken into account in interpreting the treaty."

This is commonly known as the "practice of states" doctrine and is consistent with the customary international law that preceded the Vienna Convention. Lord McNair has written:<sup>14</sup>

" . . . when there is a doubt as to the meaning of a provision or an expression contained in a treaty, the relevant conduct of the contracting parties after the conclusion of the treaty . . . has a high probative value as the intention of the parties at the time of its conclusion. This is both good sense and good law."

Thus, the doctrine of the "practice of states" holds that courts will consider how the parties to the treaty have acted in implementing the agreement. The basic concept is simple, i.e. if there is some ambiguity in the meaning of a provision, but if the parties have conducted themselves consistently with a certain interpretation of that provision, then the courts will give great weight to that conduct as evidence of the meaning of the provision.

The current draft of the American Law Institute's Restatement of the Law is in

accord both with respect to interpretation of text and the "practice of states" doctrine.<sup>15</sup>

#### Section 325. INTERPRETATION OF INTERNATIONAL AGREEMENTS:

(1) An international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its objects and purpose.

(2) Any subsequent agreement between the parties regarding the interpretation of the agreement, or subsequent practice between the parties in the application of the agreement is to be taken into account in interpreting the agreement.

In the accompanying comment, the ALI Reporters state that, although the United States has not ratified the Convention, this section "represents what states generally accept and the United States has also appeared willing to accept it."

With respect to recourse to the negotiating history, Article 32 of the Vienna Convention states,

"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31;

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable." (Emphasis added.)

Thus, under the Vienna Convention, one does not look to the negotiating history unless the means of interpretation described in Article 31 prove inadequate or lead to a result which is manifestly absurd.

Despite this stricture, courts in the United States and the International Court of Justice have been more willing to review the negotiating record than is suggested by Article 32 of the Convention.<sup>16</sup> The United States Supreme Court, in *Nielsen v. Johnson*, said:<sup>17</sup>

"When [a treaty's] meaning is uncertain, recourse may be had to the negotiations and diplomatic correspondence of the contracting parties relating to the subject matter and to their own practical construction of it."

The comment in the ALI Restatement states that "American courts are more willing than those of many other states to look outside the instrument to determine its meaning in the light of its purpose and the intent of the parties."<sup>18</sup> Thus under the approach taken by either the Vienna Convention or the U.S. courts, it is clear that resort may be had to the negotiating history if other steps fail to reveal the meaning of a particular provision.

The Traditional Interpretation maintains that the Treaty text is clear on its face. To the extent that other sources of interpretation are consulted, the Traditional Interpretation maintains that they are consistent with the traditional reading of the treaty's text.

Because Sofaer concludes that the Treaty text is ambiguous, he contends that the negotiating record must be examined to determine the meaning of the Treaty. In this regard, the Reinterpretation holds that the negotiating record, which is classified, clearly supports the reinterpretation. The Reinterpretation also considers statements made to the Senate during its ratification proceedings, and concludes that they support the broader view. In other words, the Reinterpretation concludes that the Nixon Administration did not present the Traditional Interpretation to the Senate in 1972. Finally, the Reinterpretation considers U.S. and

Soviet post-ratification statements between 1972-1985 and concludes that the record is mixed. The Reinterpretation however, disputes the view that successive U.S. administrations have consistently endorsed the Traditional Interpretation. As previously noted, I shall address each of these assertions in my three reports.

#### SECTION III: SENATE RATIFICATION PROCEEDINGS

##### A. Introduction

The ABM Treaty was signed by President Nixon and General Secretary Brezhnev on May 26, 1972. On the same day, the heads of the two negotiating delegations, Ambassadors Smith and Semenov, initialled a separate set of Agreed Statements. This included Agreed Statement D, which addressed the procedure for resolving issues that might arise regarding ABM systems and components using exotics.

Treaty ratification hearings before the Senate Armed Services Committee began on June 6, and the Senate Foreign Relations Committee commenced its proceedings on June 19. In addition, both the House Armed Services Committee and the House Foreign Relations Committee held hearings on the proposed agreements. The Senate, after a lengthy debate on August 3, gave its consent to ratification of the Treaty by a vote of 88-2.

The published records of all of these proceedings, as well as the classified transcripts of the Senate Armed Services Committee and the Foreign Relations Committee hearings, have been examined as part of this study. In view of the Senate's constitutional role in the treaty-making process, my examination focuses on the nine days of hearings held by the Senate Armed Services Committee, the six days of hearings conducted by the Senate Foreign Relations Committee, and the Senate floor debate. The period between May 26 and August 3 has been examined with a view towards identifying three categories of statements:

I. Those which explicitly support the reinterpretation.

II. Those which explicitly support the traditional view.

III. Those which generally address the subject of testing, development, or deployment of exotics but which do not explicitly support either interpretation.

##### B. Analysis of statements

The following sets forth the results of this review.

I. *The Analysis of the Reinterpretation has not identified a single statement in the record of the ratification proceedings which explicitly supports its case.*

The Sofaer analysis has not identified, nor did I find, any statements in the record in which any Senator or any Nixon Administration official explicitly stated that development and testing of mobile/space-based exotics was permitted.

II. *The record contains a series of authoritative statements explicitly supporting the traditional view that the treaty prohibits testing and development of mobile/space-based exotics.*

In a series of statements, including authoritative written statements submitted for the record, key administration officials and Senators made it clear that the Treaty's prohibition on testing and development of mobile/space-based ABM systems or components applied to exotics.

a. *At the first hearing, the Executive Branch set forth the Traditional Interpretation of the Treaty, expressly discussing the difference between fixed, land-based ABMs and mobile/space-based ABMs in the context of exotics.*

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The question of exotics was raised in the first Senate hearing that considered the Treaty. Senator Goldwater, in a question for the record to Secretary of Defense Laird, noted that he had "long favored" moving ahead with space-based ABMs capable of conducting boost-phase intercepts using "shot, nukes (sic.), or lasers," and asked whether it was correct that nothing in the Treaty "prevents development to proceed in that direction."<sup>19</sup>

The written reply from DOD distinguishes between development of fixed, land-based ABMs (which is permitted by the Treaty) and development of mobile/space-based ABMs (which is prohibited). The reply expressly related these provisions to lasers, an "exotic" ABM component.<sup>20</sup>

REPLY OF SECRETARY LAIRD TO QUESTION FROM  
SENATOR GOLDWATER

"With reference to development of a boost-phase intercept capability or lasers, there is no specific provision in the ABM Treaty which prohibits development of such systems. There is, however, a prohibition on the development, testing, or deployment of ABM systems which are space-based, as well as sea-based, air-based, or mobile land-based. The U.S. side understands this prohibition not to apply to basic and advanced research and exploratory development of technology which could be associated with such systems, or their components. There are no restrictions on the development of lasers for fixed, land-based ABM systems. The sides have agreed, however, that deployment of such systems which would be capable of substituting for current ABM components, that is, ABM launchers, ABM interceptor missiles, and ABM radars, shall be subject to discussion in accordance with Article XIII (Standing Consultative Commission) and agreement in accordance with article XIV (amendments to the treaty)." (Emphasis added.)

This statement is particularly significant because it embodies a formal, written Executive Branch response. It clearly sets forth the Traditional Interpretation of the Treaty with respect to exotics, permitting development and testing only in a fixed, land-based mode. The reply makes it clear that mobile/space-based exotics are subject to the comprehensive ban on development, testing, and deployment, with the understanding—as stated in Secretary Laird's reply—that the treaty only permits "basic and advanced research and exploratory development."

It is also noteworthy that the reply clearly links the ban on development of mobile/space-based ABM laser systems to Article V of the Treaty. Article V contains a comprehensive ban on mobile/space-based, ABM systems. Secretary Laird's express linkage between mobile/space based exotics and Article V directly refutes the Reinterpretation's analysis of the Treaty's text, which asserts that Article V applies only to components existing in 1972 (i.e., missiles, launchers, and radars).

The detailed Executive Branch reply was omitted from an October 30, 1985 analysis of the ratification debate submitted to the Senate Armed Services Committee by Sofaer on November 21, 1985.<sup>21</sup> This omission was brought to the attention of the Committee on January 6, 1986 in a letter from John Rhinelander, the legal adviser to the U.S. SALT I Delegation. In a subsequent analysis of the ratification debate published in the June 1986 *Harvard Law Review*, Sofaer conceded in a footnote that the DOD reply to Goldwater supports the Traditional Interpretation.<sup>22</sup>

b. An exchange between Senator Henry Jackson and DOD's Director of Research and Engineering confirmed the Treaty's ban

on testing and development of mobile/space-based exotics.

During the Senate debate on the SALT I accords, which included the ABM treaty, the late Senator Henry Jackson, a senior Member of the Armed Services Committee, conducted a rigorous inquiry into the agreements, with a profound impact on the conditions of Senate acceptance. From the outset, he exhibited a keen sensitivity to the issue of exotics by focussing on laser ABMs. For example, just five days after the Treaty's signing, he made a statement sharply critical of the Army's reputed cancellation of a research involving laser ABMs.<sup>23</sup>

When Secretary Laird came before the Committee on June 6, he quickly assured Senator Jackson that no such contract has been cancelled. When Senator Jackson asked about ABM Treaty limits in this area, Secretary Laird gave a general reply—noting only that "research and development can continue, but certain components and systems are not to be developed"—without getting into the distinction between fixed, land-based systems and mobile/space-based systems.<sup>24</sup>

Senator Jackson pursued that distinction in a June 22 hearing during testimony by Dr. John Foster, Director of Defense Research and Engineering, and Lt. Gen. Walter Leber, the Program Manager of the Army's Safeguard ABM system. This hearing involved a careful discussion of Treaty's limits regarding development of ABMs using exotics, with a specific focus on the distinction between fixed, land-based systems and mobile-space based systems.

Senator Jackson began by noting that there were limitations in the Treaty on lasers and then asked whether the agreement prohibited "land-based laser development?" (Emphasis added.)<sup>25</sup>

Dr. Foster replied, "No sir; it does not." The text of the printed hearing reads as follows:

LASER ABM SYSTEM

Senator JACKSON. Article V says each party undertakes not to develop and test or deploy ABM systems or components which are sea based, air based, space based or mobile land based.

Dr. FOSTER. Yes sir, I understand. We do not have a program to develop a laser ABM system.

Senator JACKSON. If it is sea based, air based, space based or mobile land based. If it is a fixed, land-based ABM system, it is permitted; am I not correct?

Dr. FOSTER. That is right.

Senator JACKSON. What does this do to our research—I will read it to you: section 1 of article 5—this is the treaty: "each party undertakes not to develop"—it hits all of these things—"not to develop, test or deploy ABM systems." You can't do anything; you can't develop; you can't test and finally, you can't deploy. It is not "or".

Dr. FOSTER. One cannot deploy a fixed, land-based laser ABM system which is capable of substituting for an AMB radar, ABM launcher, or ABM interceptor missile.

Senator JACKSON. You can't even test; you can't develop.

Dr. FOSTER. You can develop and test up to the deployment phase of future ABM system components which are fixed and land based. My understanding is that you can develop and test but you cannot deploy. You can use lasers in connection with our present land-based Safeguard system provided that such lasers augment, or are an addendum to, current ABM components. Or, in other words, you could use lasers as an ancillary piece of equipment but not as one of the prime components either as a radar or as an interceptor to destroy the vehicle.

When Senator Jackson suggested that even research on ABM lasers might be prohibited, Dr. Foster said, "No." Interposed between Senator Jackson's question and Dr. Foster's answer is the following insert for the record:<sup>26</sup>

"Article V prohibits the development and testing of ABM systems or components that are sea-based, air-based, space-based, or mobile land-based. Constraints imposed by the phrase 'development and testing' would be applicable only to that portion of the 'advanced development stage' following laboratory testing, i.e., that stage which is verifiable by national means. Therefore, a prohibition on development—the Russian word is 'creation'—would begin only at the stage where laboratory testing ended on ABM components, on either a prototype or bread-board model."

The importance of this submission as an authoritative statement of Nixon Administration policy is underscored by the original transcript of this hearing (currently maintained in the Armed Services Committee archives), which reveals two key points. First, Dr. Foster pledged to submit the insert after Senator Jackson had declared that "We had better find out" exactly how the Treaty applied to research and development in this area. Second, the transcript reveals that Dr. Foster declared that in order to clarify this issue, the submission would reflect a detailed review of the negotiating record.

The unedited exchange reads as follows:<sup>27</sup>

Dr. FOSTER. I think you can engage in research or development of laser land based ABM systems; you cannot deploy them as a kill mechanism against ICBMs. (Emphasis added.)

Senator JACKSON. Well, that is something we had better find out about it. I would [sic.] you would—

Dr. FOSTER. I would be glad to go through the record, Senator Jackson, in some detail and try to clarify this.

As is the normal practice in editing congressional hearings, the comments about what was to be submitted for the record was deleted and replaced by the actual submission.

Several observations about the extensive exchange between Senator Jackson and Dr. Foster deserve emphasis. First, it includes a formal, written submission, which provided the Executive Branch with an opportunity to prepare an official coordinated statement after review of the negotiating record. As such, it clearly represents an authoritative statement of the Administration's position. Second, the fact that the statement refers to Article V (the Treaty's ban on testing, development, and deployment of mobile/space-based ABMs) in the context of lasers (an "exotic" component) again refutes the Reinterpretation's premise that Article V does not apply to ABMs using exotics.

The Jackson-Foster exchange directly contradicts the Reinterpretation of the Treaty. The credibility of the Sofaer analysis is further undermined by the distorted manner in which it treats this crucial dialogue between a leading Senator and high-level Nixon Administration witness. For example:

(1) The version of this extensive Jackson-Foster exchange presented in Sofaer's October, 1985 analysis of the ratification proceedings and in Sofaer's June, 1986 *Harvard Law Review* article advocating the reinterpretation is greatly abbreviated. While the Reinterpretation acknowledges that Dr. Foster's comments support the Traditional Interpretation, the only portion of the entire exchange which it cites is the following:<sup>28</sup>

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Dr. FOSTER. One cannot deploy a fixed, land-based laser ABM system which is capable of substituting for an ABM radar, ABM launcher, or ABM interceptor missile. . . . You can develop and test up to the development phase of future ABM system components which are fixed and land based.

Foster's explicit confirmation that development and testing of space-based, or mobile land-based laser ABMs was prohibited is omitted in the Reinterpretation. There is also no mention in the Reinterpretation of Foster's written submission nor its linking the discussion of limits of laser ABMs to Article V.

(2) Dr. Foster, a Presidential appointee, was the highest ranking technical official, and third-ranking civilian in the Defense Department. He had served in his position since 1965. Nonetheless, the Sofaer analysis tries to disparage his testimony by stating Foster was "not involved in the drafting or negotiation of the Treaty."<sup>22</sup> The suggestion that the Director of Defense Research and Engineering would not have acquainted himself thoroughly with the Treaty's effect on programs under his supervision prior to representing the Administration before the Armed Services Committee is absurd. At any rate, as discussed above, the transcript confirms that Dr. Foster's written submission was based on a detailed review of the negotiating record.

(3) Sofaer's account of the exchange excises Senator Jackson's half of this dialogue in its entirety. As a result, anyone reading this analysis would not know that Senator Jackson had acquired a detailed understanding of the treaty limits in this area or, indeed, that the Senator took the lead in drawing out of the witness explicit confirmation of these restrictions.

(4) As a result of this omission, the only mention of Senator Jackson in Sofaer's October, 1985 analysis of all of the Armed Services Committee's ratification hearings is in a discussion of a hearing on July 19, which will be considered below. In a summary comment on Senator Jackson's July 19 statements, the Reinterpretation concludes: "Fairly read, Senator Jackson's comments do not address future systems."<sup>20</sup> By omitting the extensive June 22 Jackson/Foster exchange on laser ABMs (as well as other instances when Senator Jackson queried witnesses on the question of laser ABMs, including a highly classified session on June 26 with CIA Director Richard Helms), the Reinterpretation is then able to claim in a paragraph summarizing all congressional hearings during the ratification proceedings that "Senator Jackson's comments do not appear to address future systems."<sup>21</sup> Sofaer's assertion that Senator Jackson never addressed the question of limits on laser ABMs during the entire Senate debate on the ABM Treaty is flatly contradicted by the record of the debate.

c. In a July 19 exchange with Senator Jackson, General Palmer confirmed that the JCS supported the limitation under which testing and development of exotics was restricted to fixed, land-based systems.

The record of the July 19 hearing before the Armed Services Committee not only repudiates the claim that Senator Jackson did not address future systems, it also contains a crucial passage confirming the Joint Chiefs' understanding of the difference between fixed, land-based and mobile/space-based exotics in terms of the restrictions on development and testing.

This hearing involved an extensive exploration of Treaty's limits on exotics, focusing on laser ABMs. The key exchange occurred between three Senators (Goldwater, Jackson and Dominick), and three Executive Branch witnesses (General Ryan, Chief of

Staff of the Air Force, General Palmer, Acting Chief of Staff of the Army, and Lt. Gen. Leber, Project Manager of the Safeguard ABM Program.) This exchange covers seven pages of the printed hearing. During this exchange, the word "laser" was used thirteen times, descriptions of or references to lasers were made six other times, and the phrase "futuristic systems" was mentioned three times.

The following discussion, which was initiated by a question from Senator Goldwater as to whether the deployment of laser ABMs was banned, is representative of the dynamic, back-and-forth character of this discussion:<sup>22</sup>

General LEBER. . . . The only restriction is that you would not substitute a laser device for one of the components of your ABM system.

Senator JACKSON. Would the Senator yield right there?

Senator GOLDWATER. Yes, sir.

Senator JACKSON. Can you tell us how that is going to be monitored?

General LEBER. This would be monitored through the commission General Palmer has mentioned, the Joint Commission . . .

Senator JACKSON. Without some sort of onsite inspection, we can't monitor "development," can we?

General LEBER. I think we can detect testing of laser devices in an ABM mode; I think we can without onsite inspection.

Senator JACKSON. Testing, yes; but development, how are you going to monitor that?

From this colloquy, it is evident that Senator Jackson was concerned about the verifiability of the Treaty limits on the development and testing of laser ABMs, and he demonstrated his mastery of the details in this area by ensuring that the Committee obtained clarifying details from the witnesses. The following exchange, also on the subject of the verifiability of limits on the development and testing of laser ABMs, is illustrative of Senator Jackson's leading role in making it clear that only fixed, land-based exotics were exempt from the prohibition against testing and development:<sup>23</sup>

Senator DOMINICK. There isn't any ban, as I understand it, on research and development on either side.

General RYAN. That's right.

Senator DOMINICK. So, therefore, the onsite inspection is no different; the offsite inspection is no different now than it was before?

Senator JACKSON. Yes, but under Article V of the ABM Treaty "Each Party undertakes not to develop, test or deploy ABM systems or components which are sea-based, air-based, space-based or mobile land-based."

Senator GOLDWATER. Fixed based.

Senator JACKSON. The fixed-based ABM is exempt.

Senator GOLDWATER. Fixed based.

Senator JACKSON. The fixed-baseve [sic].

Senator GOLDWATER. We could then replace the Sentry with the laser if it became effective? (Emphasis added.)

Senator JACKSON. The prohibition runs to sea based, air based, space based, or mobile land based ABMs.

Senator GOLDWATER. Not fixed land?

Senator JACKSON. That's right. That is exempt. I am just pointing this out. In those other areas, it is prohibited and, development is also prohibited. (Emphasis added.)

This exchange directly refutes the Reinterpretation by demonstrating the understanding of these key Senators as to the difference between permissible testing and development of fixed, land-based exotics and prohibited testing and development of mobile/space-based exotics.

During the same hearing, Senator Jackson also questioned the witness about General

Palmer's broad statement that the treaty "does not limit R&D on futuristic systems."<sup>24</sup> Senator Jackson, expressing concern about the generality of this response, drew the witnesses' attention to Article V's prohibition on development of mobile ABM systems. General Ryan noted the distinction between permissible development of fixed, land-based systems and the prohibited development of mobile/space-based systems. Finally, General Palmer provided an authoritative statement on the prohibition on development of mobile/space-based exotics:

General PALMER. I would like to come back to the question.

Senator JACKSON. You are here in a professional capacity and we need your professional judgment.

General PALMER. On the question of the ABM, the facts are that when the negotiation started the only system actually under development, in any meaningful sense, was a fixed, land-based system. As the negotiations progressed and the position of each side became clear and each understood the other's objectives better, it came down to the point where to have agreement it appeared that—this is on the anti-ballistic missile side—this had to be confined to the fixed, land-based system. The Chiefs were consulted. I would have to go to a closed session to state precisely the place and time. They were consulted on the question of qualitative limits on the AB (sic) side and agreed to the limits that you see in this treaty.

Senator JACKSON. Even though it cannot be monitored?

General PALMER. Yes.

Senator JACKSON. I just wanted that; so the Chiefs went along with the concept here that involved—

General PALMER. A concept that does not prohibit the development in the fixed, land-based ABM system. We can look at futuristic systems as long as they are fixed and land based.

Senator JACKSON. I understand.

General PALMER. The Chiefs were aware of that and had agreed to that and that was a fundamental part of the final agreement. (emphasis added.)<sup>25</sup>

Sofaer's analysis of this discussion omits Palmer's crucial closing comment that the JCS were aware of the limits on development and testing of laser ABMs, had agreed to them, and recognized that this was "a fundamental part of the final agreement." Thus, the record demonstrates that Sofaer's assertion that Senator Jackson did not address the question of exotics during the ratification debate is a complete and total misrepresentation. It also underscores the inadequacy of its analysis by its omission of this additional, and authoritative, confirmation that the Treaty banned the development and testing of all but fixed, land-based exotics.

It is also noteworthy that Senator Jackson and the Executive Branch witnesses clearly cited the prohibition on testing and development of mobile/space-based systems in Article V of the treaty as the authority for the prohibition on testing and development of missile/space based ABM using exotics. This further undermines the Reinterpretation's analysis of the Treaty's text in which it asserts that Article V should not be read as applying to mobile/space-based exotics.

d. Opposition to the treaty was based on the prohibition against testing and development of mobile exotics—a limitation commonly understood by both proponents and opponents of the treaty.

On June 29, Senator James Buckley testified before the Foreign Relations Commit-



tee. By that time, he had emerged as a vocal critic of the ABM Treaty and was later one of only two Senators who voted against it. During his testimony, Senator Buckley was questioned by Senator Fulbright, Chairman of the committee, Senator Sparkman, who managed the Treaty debate on the Senate floor, and Senator Cooper, who had played one of the leading roles in the ABM deployment debate in the late 1960s.

Senator Buckley opposed the Treaty primarily because it prohibited the development, testing, and deployment of space-based ABMs using exotics.<sup>36</sup>

Thus the agreement goes as far as to prohibit the development, test or deployment of sea, air or space-based ballistic missile defense systems. *This clause, in Article V of the ABM Treaty, would have the effect, for example of prohibiting the development and testing of a laser-type system based in space which could at least in principle provide an extremely reliable and effective system of defenses against ballistic missiles.* The technological possibility has been formally excluded by this agreement. There is no law of nature that I know of that makes it impossible to create defense systems that would make the prevailing theories obsolete. Why, then, should we by treaty deny ourselves the kind of development that could possibly create a reliable techniques for the defense of civilians against ballistic missile attack? (emphasis added.)

In response to a question by Senator Sparkman, Senator Buckley made it clear that he was opposed to the Treaty not because it prohibited an ABM defense using *then-current* systems, but rather because it prohibited the development of *new* space-based ABM systems.<sup>37</sup>

Senator SPARKMAN. Senator Buckley, I think you make your position clear. Now, as I understand it, you do not agree with the President in his viewpoint on this, nor the Joint Chiefs of Staff?

Senator BUCKLEY. . . . Where I am in disagreement . . . is the philosophy of a mutual deterrence . . . Now on the basis of existing technology, I can see the reasoning for this, although there is a question about the effectiveness of available ABM technology; but I do question the morality of deciding now for all time that we will preclude ourselves from developing new concepts which at a later date could mean that the city of Washington or New York or San Francisco or Detroit could not be meaningfully protected . . .

The record of the hearing indicates that these three senior members of the committee of principal jurisdiction over the Treaty well-understood the basis for Senator Buckley's opposition. Indeed, Senator Cooper, while not agreeing with Senator Buckley's opposition to the Treaty, praised the witness for his testimony, saying:<sup>38</sup>

I would like to say I think that Senator Buckley has performed a useful service here today. You have raised practically every question I think that might have been considered by the negotiators. Your paper shows the very thorough knowledge you have of the negotiations and of the systems. Your questions are very valuable because the questions you raised, in their technical application at least, are correct.

On August 3, during debate on the treaty on the floor of the Senate, Senator Buckley repeated the main themes he voiced during his appearance before the Foreign Relations Committee, including the following principal criticism of the treaty:<sup>39</sup>

"Thus the agreement goes so far as to prohibit the development, test or deployment of sea, air or space based ballistic missile defenses. This clause, in Article V of the ABM treaty, would have the effect, for example,

of prohibiting the development and testing of a laser type system based in space which could at least in principle provide an extremely reliable and effective system of defenses against ballistic missiles. This technological possibility has been formally excluded by this agreement."

Senator Buckley's testimony before the Senate Foreign Relations Committee clearly confirms the meaning of the treaty as presented to the Senate by the Executive Branch. Despite the clear, un rebutted impact of this testimony, it is omitted completely from Sofaer's October, 1985 analysis and his 1986 *Harvard Law Review* article. Sofaer cites Buckley's floor speech, but denigrates its significance by raising "the possibility that opponents of the treaty may have tries to exaggerate its limitations."<sup>40</sup> In view of the consistency between Buckley's statement and the Executive Branch's presentation of the treaty, this assertion is without merit.

The Senate's understanding of the treaty is underscored in the following remarks by Senator Thurmond, delivered on the floor of the Senate just prior to the vote on the treaty:<sup>41</sup>

Under the treaty, we also give up the right to deploy any *land-based systems of a new type*. At the same time we undertake 'not to develop, test, or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land-based.'" (Emphasis added.)

The Reinterpretation acknowledges that "Thurmond's comment could be read to indicate development of future systems, other than land-based, was prohibited."<sup>42</sup>

III. *The record contains various general statements on the development, testing or deployment of exotics, without reference to their basing mode. Because these statements do not distinguish between fixed, land-based systems and mobile/space-based systems, they carry little probative value either way with respect to the correct interpretation.*

The record of the ratification proceedings contains a number of other statements which touched on the subject of exotics. Most of these involved a general statement by a Senator or an administration official to the effect that under the Treaty, future ABM systems based on other physical principles could not be deployed. Other statements involved general remarks that "R&D" on lasers was permitted, but without any specificity as to basing mode (i.e. whether fixed, land-based or mobile/space-based).

As previously noted, the reinterpretation does not cite a single statement in the record of the Senate ratification proceedings in which a Senator or Executive Branch official *explicitly* states that development and testing of mobile/space-based exotics is permitted under the Treaty. Consequently, the reinterpretation's claim that this record can be read to support the reinterpretation rests on statements which it *infers* as supportive of this view. All of these statements fall into one or the other of the two following categories.

#### a. *General Statements Concerning the Ban on Deployment*

In the Reinterpretation, much is made of brief statements to the effect that the deployment of exotics is banned. For example, during his May 26, 1972 press conference, Ambassador Smith said, "future systems . . . will not be deployable unless this treaty is amended."<sup>43</sup> The Reinterpretation reads this statement as supportive of its case, arguing that "It is unlikely that Ambassador Smith, the negotiator of the Treaty, would have referred to only a ban on deployment if he had meant testing and development were banned as well."<sup>44</sup>

Smith's statement that the deployment of exotics is banned is, however, fully consistent with the Traditional Interpretation. Nonetheless, the Reinterpretation suggests that since Smith cited the ban on deployment of exotics but omitted any mention of a ban on their development or testing, then he must have believed that the Treaty gave a "green light" to such activities; that is, that he would have gone on to say, had he voiced his opinion on this issue, that the Treaty *permits* the development and deployment of all exotics.

In short, the Reinterpretation presumes that if Smith had believed that the Traditional Interpretation had been agreed to he would not have said simply that "future systems . . . will not be deployable unless this treaty is amended"—he would have said that "future systems will not be developed, tested, or deployed unless this treaty is amended."

There are three major problems with the logic upon which this analysis is based. First, the Smith statement is true and accurate on its face because under either interpretation deployment of future systems (i.e., exotics) is banned. Second, it attempts to build a major case on what was *not said*. Third, if Smith had said what the Reinterpretation postulates he should have said, he would have been *wrong*. Why? Because under both the Traditional Interpretation and the Reinterpretation, the development and testing of fixed, land-based exotics is permitted. Development or testing of mobile/space-based exotics is, of course, banned under the Traditional Interpretation.

Under the logic of the Reinterpretation, to prevent his remarks from being distorted in the future and, at the same time, ensure accuracy, Smith would have had been compelled to turn his brief sentence into something resembling the following:

"Future systems (i.e., exotics)—whether fixed, land-based or mobile/space-based—will not be deployable unless the treaty is amended. Future fixed, land-based exotics may be developed and tested, but only at the agreed test ranges as established under Article IV. Future mobile/space-based exotics may not be developed or tested at all in accordance with Article V."

In summary, the assertion by the Reinterpretation that a speaker's belief may be inferred from words he did not utter is illogical. The fact that the Reinterpretation's conclusions as to the Senate ratification debate rely so heavily upon such statements reveals the flimsiness of its case.

In addition to Smith's May 26 statements, the following statements fall into the category of general remarks concerning the ban on deployment:

(1) A section in Secretary of State Rogers' June 10 letter of transmittal, subheaded "Future ABM Systems", which included the following sentences:<sup>45</sup>

"A potential problem dealt with by the Treaty is that which would be created if an ABM system were developed in the future which did not consist of interceptor missiles, launchers and radars. The Treaty would not permit the deployment of such a system or of components thereof capable of substituting for ABM interceptor missiles, launchers or radars."

The Reinterpretation postulates that Rogers should have said that the development and testing of exotics was banned if he believed the Traditional Interpretation had been achieved. This overlooks the fact that Rogers could not accurately have said this if he believed the more restrictive position had been achieved, since it would have been incorrect as it applies to fixed, land-based

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exotics. Neither did Rogers say that the development and testing of exotics are permitted. Had he said this, it would in fact support the Reinterpretation, but he did not. The fact that Rogers elected not to provide a detailed elaboration of the limits on development and testing as it applied to fixed, land-based versus mobile/space-based exotics does not support the Reinterpretation.

(2) Two statements by Secretary Rogers to the Foreign Relations Committee on June 19 which indicated that future "exotic" types of ABMs, such as lasers, could not be deployed.<sup>46</sup> The Reinterpretation postulates that Rogers should have said that the development and testing of exotics was banned if he believed the Traditional Interpretation had been achieved. This overlooks the fact that Rogers could not accurately have said this if he believed the more restrictive position had been achieved, since it would have been incorrect as it applies to fixed, land-based exotics. Neither did Rogers say that the development and testing of exotics was permitted. Had he said this, it would in fact support the Reinterpretation, but he did not. The fact that Rogers elected not to provide a detailed elaboration of the limits on development and testing as it applied to fixed, land-based versus mobile/space-based exotics does not support the Reinterpretation.

(3) A similar comment by Ambassador Smith at the same hearing.<sup>47</sup> The Reinterpretation postulates that Smith should have said that the development and testing of exotics was banned if he believed the Traditional Interpretation had been achieved. This overlooks the fact that Smith could not accurately have said this if he believed the more restrictive position had been achieved, since it would have been incorrect as it applies to fixed, land-based exotics. Neither did Smith say that the development and testing of exotics was permitted. Had he said this, it would in fact support the Reinterpretation, but he did not. The fact that Smith elected not to provide a detailed elaboration of the limits on development and testing as it applied to fixed, land-based versus mobile/space-based exotics does not support the Reinterpretation.

(4) A June 28 prepared statement by Ambassador Smith during an Armed Services Committee hearing that no exotics could be deployed unless the treaty was amended.<sup>48</sup> The Reinterpretation postulates that Smith should have said that the development and testing of exotics was banned if he believed the Traditional Interpretation had been achieved. This overlooks the fact that Smith could not accurately have said this if he believed the more restrictive position had been achieved, since it would have been incorrect as it applies to fixed, land-based exotics. Neither did Smith say that the development and testing of exotics was permitted. Had he said this, it would in fact support the Reinterpretation, but he did not. The fact that Smith elected not to provide a detailed elaboration of the limits on development and testing as it applied to fixed, land-based versus mobile/space-based exotics does not support the Reinterpretation.

**b. General statements concerning research and development of exotics.**

The Reinterpretation also points to a number of statements in which a witness or Senator states that lasers could be developed under the Treaty—without differentiating between fixed, land-based and mobile/space-based systems. Under both interpretations, such statements are correct as applied to fixed, land-based laser ABMs. In addressing these statements, it is important to recognize that at the time of the 1972 ratification debate, the only U.S. R&D program of

any significance in the area of laser ABMs was a fixed, land-based system. As previously noted, the Nixon administration had been stung by Senator Jackson's charge in early June that an Army laser ABM contract had been cancelled due to the Treaty. Thus, it is not surprising that executive branch officials would have sought to assure the Senate by making broad statements that R&D on laser ABMs could continue.

The following statements—all of which are cited by the Reinterpretation in support of its case—fall into this category:

(1) A June 20 reply by Secretary Laird to a question by Senator Thurmond:<sup>49</sup>

Senator THURMOND. I understand we have had R&D programs, such as the development of the laser-type ABM system. Is there a good reason why we should forever preclude the possibility of developing a truly effective defense of our cities if our technology should make one available?

Secretary LAIRD. \* \* \* The Treaty, of course, does make such deployments contingent upon treaty amendment, but it does permit research and development on the ongoing technology which we have in these fields.

(2) A June 22 exchange between Dr. Foster and Senator Smith:<sup>50</sup>

Senator SMITH. In other words, the laser, if it was developed to the ultimate, could not be used at one of the two sites.

Dr. FOSTER. Yes, its deployment would be prohibited by the Treaty \* \* \*

Senator SMITH. But that will not slow us up or slow us down on continued research and development of the laser, will it?

Dr. FOSTER. No, Senator, it will not.

(3) A statement by Ambassador Smith to Senator Smith at the same hearing that development but not deployment of ABM systems based on "different physical principles" was permitted. This statement made no mention of whether this was affected by the basing mode.<sup>51</sup>

(4) A statement by Ambassador Smith to Senator Goldwater at the same hearing that neither side would be precluded from the development of the laser as an ABM.<sup>52</sup>

(5) A statement by Senator Fong during his August 3 floor speech which noted generally that research and development of "exotics" could be continued.<sup>53</sup>

**Conclusions**

The record clearly demonstrates that the key figures in the Senate debate—Senators Jackson, Buckley, Goldwater, Thurmond, Cooper and Sparkman—understood that the development, testing and deployment of space-based "exotics" was not permitted under the treaty.

Moreover, there was clearly a perception within the Senate that the ratification hearings had served a crucial function in clarifying the Treaty's terms. Senator Jackson commented on this during his final speech on the Treaty just prior to the vote. After noting the extensive hearings in the Armed Services Committee and the "literally hundreds" of questions he has asked, Senator Jackson said:<sup>54</sup>

"Several things emerged from this effort, not least of all some important clarification by administration spokesman of various provisions of the agreements. Some of these provisions had been interpreted in several different ways depending on the witness commenting upon them. I believe the hearings were helpful both in clarifying the obligations we have undertaken and in understanding the implications for our future security of the many limitations to which we and the Soviets have agreed. Many Senators will recall the early confusion that surrounded the first announcements of the agreements. I hope that as we begin our

consideration of the agreements the terms of them are at last firmly in mind."

In this regard, it is noteworthy that with the exception of Senator Fong's floor statement, all of the general statements on deployment and R&D occurred early in the ratification proceedings (i.e., in June), well before the extensive exploration of Treaty limits on lasers which took place during the July 19 Armed Services Committee hearing (and before Senator Buckley's June 29 testimony before the Foreign Relations Committee).

Finally, the prohibition on testing and development of exotics was squarely presented to the Senate by the Executive Branch, and that policy choice (but not the treaty interpretation) was vigorously challenged by Senator Buckley. *At no point during the proceedings did any Executive Branch witness or Senator say "no, that interpretation is wrong, the treaty does not prohibit such testing."* Indeed, during the pointed discussions of exotics involving the distinction between fixed, land-based ABMs and mobile ABMs, not one witness or Senator ever stated that deployment and testing of mobile/space-based exotics was permitted.

The record of the ratification proceedings supports the following conclusions about the scope of the Treaty.

Executive Branch witnesses clearly stated that development and testing of mobile/space-based exotics was banned, while development and testing of fixed, land-based exotics was permitted.

Key members of the Senate (including Senators Henry Jackson, Barry Goldwater, John Sparkman, and James Buckley) were directly involved in the dialogue and debate concerning the implications of the treaty, which the record indicates they clearly understood to ban testing and development of mobile/space-based exotics.

The Reinterpretation is based on two categories of incomplete, imprecise, or general statements: those which indicate that exotics cannot be deployed and those which indicate that R&D on lasers is permitted. However, each of these statements can be read as consistent with either the Traditional Interpretation or the Reinterpretation. Furthermore, all but one of these occurred early in the proceedings before clarifications were brought out in the course of detailed questioning in the Armed Services Committee.

The record of the Senate proceedings does not support Sofaer's assertion that the record of the Senate ratification proceedings on the ABM Treaty and statements made at or near the ratification period "can be fairly read to support the so-called broader interpretation."<sup>55</sup> On the contrary, the record of these proceedings makes a compelling case for the opposite conclusion: that the Senate was presented with a treaty that prohibited testing or development of mobile/space-based exotics; both the proponents and opponents of the treaty understood the agreement to have this effect; and there was no challenge to this understanding in the course of the Senate's approval of the treaty.

In summary, I have examined the Reinterpretation's analysis of the Senate ratification proceedings and found its conclusions with respect to this record not to be credible. I have concluded that the Nixon Administration presented the Senate with the Traditional Interpretation of the Treaty's limits on mobile/space-based exotics. I have also concluded that the Senate clearly understood this to be the case at the time it gave its advice and consent to the ratification of the Treaty. In my judgment, this

conclusion is compelling beyond a reasonable doubt.

This finding does not address all issues raised by the Reinterpretation. In the two succeeding reports, I will examine the issues of subsequent practice and the negotiating record, and any final judgments must incorporate those assessments. Nonetheless, the finding that the Senate approved the ABM Treaty on the basis of its clear understanding and acceptance of the traditional interpretation has serious ramifications for executive branch conduct. These implications will be addressed in the following section.

#### SECTION IV: IMPLICATIONS FOR EXECUTIVE BRANCH CONDUCT

*A. The novel attempt to dismiss the significance of statements during ratification proceedings ignores basic principles of treaty interpretation.*

In recent weeks, the State Department has raised a new theory, apparently pleading its case in the alternative. State has argued that regardless of whether the ratification proceedings support the the Reinterpretation, Executive Branch testimony presented to the Senate during the treaty-making process can be disregarded because it "has absolutely no standing" with the Soviets. In my opinion, this argument is incorrect in the context of the ABM Treaty, and is squarely in conflict with the constitutional role of the Senate.

Recent Soviet statements indicate that they now consider themselves bound by the Traditional Interpretation. For example, in an October 19, 1985 article in *Pravda*, Marshal Sergei Akhromeyev, the Chief of the Soviet General Staff, stated: "Article V of the Treaty absolutely unambiguously bans the development, testing, and deployment of ABM systems or components of space or mobile ground basing, and, moreover, regardless of whether these systems are based on existing or 'future' technologies."<sup>55</sup> The Reagan Administration has not argued that the Soviets do not now claim to be bound by the Traditional Interpretation. Rather, the administration's position—as stated by Sofaer—is that "only after the United States announcement of its support for the broader interpretation in October 1985 did the Soviet Union begin explicitly to articulate the restrictive interpretation."<sup>57</sup>

Since the Soviets clearly agree with the traditional interpretation, the State Department's suggestion that statements made by U.S. officials during ratification proceedings have no standing with the Soviets is a curious argument. Let us assume, however, that the Soviets were now asserting that U.S. statements during the ratification proceedings had "no standing" with them. Would the U.S. have any basis in international law for relying on the statements to the Senate if we were insisting that the Soviets comply with the traditional view?

As a matter of international law, the actions of the parties, including their statements, provides an important guide to the meaning of a Treaty. As Lord McNair notes in his classic treatise, *The Law of Treaties*,<sup>58</sup> "when there is a doubt as to the meaning of a provision or an expression contained in a treaty, the relevant conduct of the parties after conclusion of the treaty (sometimes called the 'practical construction') has a high probative value as to the intention of the parties at the time of its conclusions."<sup>59</sup>

McNair also states that "when one party in some public document such as a statute adopts a particular meaning, circumstances can arise, particularly after the lapse of time without any protest from the other party, in which that evidence will influence a tribunal."<sup>60</sup> Furthermore, "[w]hen one party to a treaty discovers that other par-

ties to a treaty are placing upon it an interpretation which in the opinion of the former it cannot bear, and it is not practical to secure agreement upon the matter, the former party should at once notify its dissent to the other parties and publish a reasoned explanation of the interpretation which it places upon the term in dispute."<sup>60</sup> This is similar to the proposition under U.S. domestic law, that "if one party knows or has reason to know that the other party interprets language in a particular way, his failure to speak will bind him to the other party's understanding."<sup>61</sup> Although not necessarily binding as a matter of international law, the failure to object to a publicly announced interpretation by another party to a treaty is clearly relevant to the treaty's meaning.<sup>62</sup>

In the case of the ABM Treaty, these principles take on even greater significance in view of attendance by Soviet officials at the Senate hearings on the agreement. Indeed, Senators Goldwater and Jackson noted the presence of one such Soviet official—who was apparently a regular attendee—during an extensive discussion with Nixon Administration officials during a July 19 Armed Services Committee hearing that dealt at length and in great detail with the specific question of the Treaty's limitations in the area of laser ABMs.<sup>63</sup> Even if the presence of Soviet observers had not been noted for the record—which it was—it is obvious that the Soviets, who understand how our treaty-making process works, monitored the proceedings and reviewed the public records. Based on their clear awareness of the interpretation being presented to the Senate, if the Soviets chose to enter the Treaty into force without raising an objection, the U.S. would have had a very strong basis in law for insisting on the original meaning as presented to the Senate—particularly if the Soviets waited until 15 years later to undertake a different view of the treaty.

Aside from the immediate issue of the ABM Treaty, it is contrary to the long-term interests of the United States to assert that statements made to the Senate have no standing with other parties to a treaty. The international community is well-aware of the constitutional role of the Senate in the treaty-making process, and they are on notice that the executive branch explains treaties to the Senate during the ratification proceedings. It is to our national advantage to ensure that such authoritative explanations remain available as powerful evidence of a treaty's meaning in the event of an interpretative dispute among nations.

*B. By asserting that executive branch assurances to the Senate may be disregarded, the proposed reinterpretation has raised a direct constitutional confrontation with the Congress.*

By asserting that the Executive Branch may now disregard the views of those who spoke for the Administration and those who debated the issue in the Senate, the State Department is arguing, in effect, that Administration witnesses need not accurately reflect the executive's understanding of a treaty; instead, they are free to keep that understanding a secret and may mislead the Senate into consenting to a treaty which has a secret interpretation different from the meaning presented to the Senate. This line of argument has profound implications for the legislative process in general and the constitutional role of the Senate in particular.

Executive branch statements to the Senate during hearings on a proposed treaty may provide important evidence on issues of treaty interpretation in the international arena. They fill an even more important

role, however, in our constitutional system. Such statements are an integral part of the making of a treaty, often shaping its content, and well-known to all parties to the proposal.

Under Article II, section 2, clause 2 of the Constitution, the presidential power to make treaties is subject to the requirement for advice and consent by two-thirds of the Senators present. Article VI, paragraph 2 provides that treaties are the supreme law of the land, which results in giving treaties the same force and effect as legislation enacted after action by both Houses of Congress.

Louis Henkin, one of the leading constitutional authorities in this field, has noted that "although treaty-making has often been characterized as an executive function (in that special sense in which the conduct of foreign relations is executive), constitutional writers have considered the making of treaties to be different from others exercises of presidential power, principally because of the Senate's role in the process, perhaps too because treaties have particular legal and political qualities and consequences."<sup>64</sup>

Hamilton, in *The Federalist* (No. 75), clearly illustrated the intent of the Framers that treaty-making be a shared power between Congress and the President, based on mutual trust:<sup>65</sup>

"The power in question seems . . . to form a distinct department, and to belong, properly, neither to the legislative nor the executive. The qualities elsewhere detailed as indispensable in the management of foreign negotiations, point out the Executive as the most fit agent in those transactions; while the vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole or a portion of the legislative body in the office of making them."

Madison took the position that "there are sufficient indications that the power of treaties is regarded by the constitution as materially different from mere executive power, and as having more affinity to the legislative than to the executive character."<sup>66</sup>

The Senate has played a vital role in numerous treaty negotiations, through means such as the process of confirming negotiators, statutory requirements for congressional consultation during the negotiations process, and informal discussions.<sup>67</sup> Under current practice, when a proposed treaty is submitted, the Senate may consent to the treaty, withhold its consent (either expressly or through inaction), or approve it with conditions.<sup>68</sup>

Because the Senate is an active participant in the making of the treaty, the hearings and debates are a vital source of information as to what the treaty means. The nature of the issue and the testimony of executive branch witnesses may lead the Senate to attach conditions (e.g., if there is dispute as to a provision) or forego conditions (e.g., if there is an authoritative statement as to the meaning of a provision.)

The position of the State Department sends a clear message to the Senate: you cannot rely on our representations as to the meaning of a treaty. The adverse consequences of this proposition extend far beyond the issues at hand regarding the ABM treaty. Our treaty relationships involve not only arms control matters, but also trade and business matters affecting the economic well-being of our nation. We cannot ask the public to support proposed treaties if the executive takes the position that uncontradicted formal representations by senior officials are irrelevant as to the meaning of a treaty.

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Because treaties are the supreme law of the land, the position of the State Department, if accepted by the Executive Branch, would compel the Senate to incorporate into its resolution of consent an "amendment" of "understanding" for every explanation given by an executive branch witness lest it be disavowed as "unilateral" after ratification. Treaties so laden would sink under their own weight. It would be extremely difficult to achieve bilateral agreements, and virtually impossible for the United States to participate in multilateral treaties. In addition, the Senate would feel compelled to request in each case a complete record of the negotiating history in order to ensure that no secret understandings would emerge contrary to assurances given to the Senate.

In short, in an effort to save the Reinterpretation by asserting that Executive Branch statements to the Senate are essentially meaningless, the State Department is risking a serious constitutional confrontation involving the Executive Branch and Congress. It would be a mistake for the Executive Branch to compound the problem further by asserting that the Senate has no role to play with respect to the meaning of treaties. Although the President traditionally has determined the position of the United States as to the meaning of a treaty for international purposes, his authority is not unilateral. It is subject, for example, to any understandings imposed by the Senate in its consent to ratification.<sup>99</sup> Moreover, as noted by Henkin, "Congress, too, has occasion to interpret a treaty when it considers implementing legislation or other legislation on the same subject [and has] . . . claimed the right to interpret a treaty independently, even while admitting that the Executive's interpretation is entitled to 'great weight.' It could happen, then, that Congress and the courts would in effect apply treaty provisions differently from those that bind the United States internationally—another cost of the separation of powers."<sup>100</sup>

As a general proposition, the views of the Executive on the interpretation of a treaty normally receive great deference from the Congress. Application of that principle in terms of the meaning presented to the Senate by the Executive Branch at the time of ratification leads to an interpretation that mobile/space-based exotics may not be developed or tested. Under the Reinterpretation, such testing and development is permitted. In this situation, many in the Senate may be inclined to apply the classic line of cross-examination to the Executive Branch: "Should we believe what you were telling us then or should we believe what you are telling us now?"

The Senate has the right to presume that Executive Branch witnesses are informed and truthful in their testimony, particularly when it comes to the Senate's constitutional role as a participant in the treaty-making process. The State Department's assertion that the executive, in effect, may mislead the Senate as to the meaning of a Treaty has the unfortunate effect of directly challenging the Senate's constitutional role. The effect may well produce a Congressional backlash through exercise of the power of the purse and the power to raise and support armies in a manner that would give effect to the original meaning of the Treaty as presented to the Senate.

#### C. Conclusion

The Senate was clearly informed by the Executive Branch that the Treaty prohibits testing and development of mobile/space-based ABMs using exotics. This was an issue which key Senators viewed as a matter of significance, and which was directly ad-

ressed by the Executive Branch during the treaty-making process in statements to the Senate. These circumstances raise a number of possibilities with respect to the significance of other evidence as to the meaning of the Treaty:

a. If the negotiating record and evidence of subsequent practice by the parties supports the Traditional Interpretation, the issue would be beyond question.

b. If the negotiating record and evidence of subsequent practice is ambiguous or inconclusive, there would be no basis for abandoning the Traditional Interpretation as clearly understood by the Senate at the time it gave its advice and consent on the basis of this understanding. Absent compelling evidence that the Senate was misinformed as to the agreement between the United States and the Soviet Union, the compact reached between the Senate and the Executive Branch at the time of ratification should be upheld.

c. If the negotiating record and evidence of the subsequent practices of the United States and the Soviet Union establish a conclusive basis for the Reinterpretation, this would mean that the Nixon Administration signed one contract with the Soviets and the Senate ratified a different contract. Such a conclusion would have profoundly disturbing constitutional implications—to say the least. In effect, the President would have to choose between the Executive Branch's obligations to the Senate and its contract with the Soviet Union. If he did not choose to honor the commitments the Senate, the Senate would have to develop an appropriate response or risk having its role in the treaty-making process become meaningless.

In two reports which I intend to present to the Senate within a few days, I will address the subsequent practice of the two parties and the Treaty negotiating record with a view towards determining which of the three situations currently confronts the Senate.

#### FOOTNOTES

<sup>1</sup> Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, 23 U.S.T. 3435, T.I.A.S. No. 7503 [hereinafter cited as ABM Treaty].

<sup>2</sup> *Strategic Arms Limitation Agreements: Hearings before the Senate Foreign Relations Committee*, 92d Cong., 2d Session 5 [hereinafter cited as 1972 Foreign Relations Hearings].

<sup>3</sup> See Sofaer, *The ABM Treaty and the Strategic Defense Initiative*, 99 Harv. L. Rev. 1971 (1986). Sofaer also has described his analysis in a number of congressional hearings. E.G., *Strategic Defense Initiative, Hearings before the Senate Committee on Armed Services*, 99th Cong., 1st Sess. 136-91 (1985) [hereinafter cited as 1985 Senate Hearings]; *Treaty Interpretation Dispute: Hearing before the Subcommittee on Arms Control, International Security and Science of the House Comm. on Foreign Affairs*, 99th Cong., 1st Sess. 4-51 [hereinafter cited as 1985 House Hearing].

<sup>4</sup> 1985 Senate Hearings, *supra* note 3, at 142.

<sup>5</sup> *Id.* at 167.

<sup>6</sup> *Id.* at 141.

<sup>7</sup> 1985 House Hearing, *supra* note 3, at 10.

<sup>8</sup> 1985 Senate Hearings, *supra* note 3, at 264.

<sup>9</sup> *Id.* at 398.

<sup>10</sup> *Id.* at 399.

<sup>11</sup> See note 3 *supra*.

<sup>12</sup> The Vienna Convention on the Law of Treaties, Signed by the United States in Vienna, April 24, 1970, submitted to the Senate on November 22, 1971 by President Nixon but not ratified, Executive L, 92d Congress, 1st Session, 8 I.L.M. 679.

<sup>13</sup> Lord McNair, *Law of Treaties* 380-81 (1961). See also, McDougal, Lasswell and Miller, *The Interpretation of Agreements and World Public Order* 82-111 (1967).

<sup>14</sup> McNair, *supra*, at 424.

<sup>15</sup> *Restatement of the Law, Foreign Relations Law of the United States (Revised)*, Tentative Draft No. 6—Volume 2, April 12, 1985.

<sup>16</sup> *Id.*; McDougal, Lasswell, and Miller, *supra* note 13, at 132-44.

<sup>17</sup> 279 U.S. 47 (1929); see *Air France v. Saks*, 470 U.S. 392, 396 (1985).

<sup>18</sup> *Restatement, supra* note 15, at 325-4.

<sup>19</sup> *Military Implications of the Treaty on the Limitations of Anti-Ballistic Missile Systems and the Interim Agreement on Limitation of Strategic Offensive Arms: Hearings before the Senate Committee on Armed Services*, 92d Cong., 2d Sess. 40 (1972) [hereinafter cited as 1972 Armed Services Hearings].

<sup>20</sup> *Id.* at 40-41.

<sup>21</sup> "Analysis of U.S. Post-Negotiation Public Statements Interpreting the ABM Treaty's Application to Future Systems," The Legal Adviser, U.S. Department of State, October 30, 1985, reprinted in 1985 Senate Hearings, *supra* note 3, at 167.

<sup>22</sup> 99 Harv. L. Rev. at 1982 n. 28.

<sup>23</sup> 118 Cong. Rec. 19,411 (1972). Senator Jackson said, "I was greatly disturbed, for example, to learn only yesterday that Secretary Laird has ordered the cancellation of a theoretical study conducted by one of our research organizations of the application of laser technology to ballistic missile defense. Nothing in the agreements as they have been published would call for this action."

<sup>24</sup> 1972 Armed Services Hearings, *supra* note 19, at 31.

<sup>25</sup> *Id.* at 274.

<sup>26</sup> *Id.* at 275.

<sup>27</sup> *Id.*, transcript at 312.

<sup>28</sup> 1985 Senate Hearings, *supra* note 3, at 169-170.

<sup>29</sup> *Id.* at 171.

<sup>30</sup> *Id.* at 170.

<sup>31</sup> *Id.* at 171.

<sup>32</sup> 1972 Armed Services Hearings, *supra* note 19, at 439.

<sup>33</sup> *Id.* at 440.

<sup>34</sup> *Id.* at 438.

<sup>35</sup> *Id.* at 443.

<sup>36</sup> 1972 Foreign Relations Hearings, *supra* note 2, at 258.

<sup>37</sup> *Id.* at 268.

<sup>38</sup> *Id.* at 269.

<sup>39</sup> 118 Cong. Rec. 26,703 (1972).

<sup>40</sup> 1985 Senate Hearings, *supra* note 3, at 171.

<sup>41</sup> 118 Cong. Rec. 26,700 (1972).

<sup>42</sup> 1985 Senate Hearings, *supra* note 3, at 171.

<sup>43</sup> See 1972 Armed Services Hearings, *supra* note 19, at 99. It is noteworthy that in the same statement Smith said that Article II, which defines ABM systems covered by the Treaty, "has a very important bearing on the whole question of what we call future ABM systems." This directly contradicts the Reinterpretation, which is based on the premise that Article II does not cover future systems.

<sup>44</sup> 1986 Senate Hearings, *supra* note 3, at 168.

<sup>45</sup> Reprinted in 1972 Armed Services Hearings, *supra* note 19, at 81. Under the same subheading ("Future ABM Systems"), Rogers' letter also included a discussion of the definitions in Article II and the prohibitions on deployment in Article III under this same subheading ("Future ABM Systems"), thereby indicating that such exotics were covered by these provisions. This contradicts the Reinterpretation's contention that exotics were covered only by Agreed Statement D.

<sup>46</sup> 1972 Foreign Relations Hearings, *supra* note 2, at 6, 20. In his prepared statement, Rogers said, "Perhaps of even greater importance as a qualitative limitation is that the parties have agreed that future exotic types of ABM systems, i.e., systems depending on such devices as lasers, may not be deployed, even in permitted areas." Later, in response to a question by Senator Aiken about laser ABMs, he said, "Under the agreement we provide that exotic ABM systems may not be deployed and that would include, of course, ABM system based on the laser principle."

<sup>47</sup> *Id.* at 20. In response to another question by Senator Aiken on Laser ABMs, Smith said:

" . . . we have covered this concern of yours in this treaty by prohibiting the deployment of future type technology. Unless the Treaty is amended, both sides can only deploy launchers and interceptors and radars. There are no inhibitions on modernizing this type of technology except that it cannot be deployed in mobile land-based or space-based or sea-based or air-based configurations. But the laser concern was considered and both sides have agreed that they will not deploy future type ABM technology unless the treaty is amended."

<sup>48</sup> 1972 Armed Services Hearings, *supra* note 19, at 287. Smith said: "The development and testing, as well as deployment of sea, air, space-based, and land-mobile ABM devices is prohibited. Of perhaps even greater importance, the parties have agreed that no future types of ABM systems based on different physical principles from present technology can be deployed unless the treaty is amended."



- \* *Id.* at 171.  
 \* *Id.* at 222.  
 \* *Id.* at 295.  
 \* *Id.* at 306.  
 \*\* 118 Cong. Rec. at 26,707 (1972). Senator Pong said, "[The Treaty] (allows) research and development on ABM systems to continue, but not the deployment of exotic or so-called future systems."  
 \* *Id.* at 26,693.  
 \*\* 1985 Senate Hearings, *supra* note 3, at 167.  
 \* Foreign Broadcast Information Service, Oct. 19, 1985, at AA3.  
 \* 99 Harv. L. Rev. at 1985 n.37.  
 \* McNair, *supra* note 13, at 424.  
 \* *Id.* at 427.  
 \* *Id.* at 429.  
 \* Corbin on Contracts (C. Kaufman, ed., Supp. 1984), at 462.  
 \* McNair, *supra* note 13, at 431. Cf. *Anglo-Iranian Oil Case* (United Kingdom v. Iran) ICJ Reports (1952) at 16-18 in which the International Court of Justice noted the failure of the British Government to object to Iranian domestic legislation as evidence of Iran's obligations under a treaty with respect to the British Government.  
 \* 1972 Armed Services Hearings, *supra* note 19, at 437. This exchange—which immediately preceded the discussion in which the word laser was used thirteen times—went as follows:  
 Senator GOLDWATER. I recognize what I have said about the inability of the man in uniform and inability of the man in civilian clothes to answer pertinent questions that I think we should have the answers to, and I keep thinking of Senator Jackson's remarks here about the member of the Soviet embassy. Is he here today?  
 Senator JACKSON. Yes.  
 Senator GOLDWATER. He is an expert in this field—Senator Jackson said this gentleman knows all the answers to the questions I am asking—I can't understand why a U.S. Senator can't have the same knowledge.  
 \* L. Henkin, *Foreign Affairs and the Constitution*, 130 (1972).  
 \* *The Federalist Papers*, No. 75.  
 \* Quoted in Henkin, *supra* note 64 at 130, n.\*.  
 \* See Henkin, *supra* note 64, at 131-36; *Treaties and Other International Agreements: The Role of the Senate*, S. Rpt. No. 205, 98th Cong., 2d Sess. 30-36 (1984) (Prepared for the Senate Foreign Relations Committee by the Congressional Research Service).  
 \* S. Rpt. 205, *supra*, at 109-18.  
 \* *Id.* at 119-29.  
 \* Henkin, *supra* note 64, at 167, n\*.

**TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE UNION OF SOVIET SOCIALIST REPUBLICS ON THE LIMITATION OF ANTI-BALLISTIC MISSILE SYSTEMS**

Signed at Moscow May 26, 1972.  
 Ratification advised by U.S. Senate August 3, 1972.

Ratified by U.S. President September 30, 1972.

Proclaimed by U.S. President October 3, 1972.

Instruments of ratification exchanged October 3, 1972.

Entered into force October 3, 1972.

The United States of America and the Union of Soviet Socialist Republics, hereinafter referred to as the Parties.

Proceeding from the premise that nuclear war would have devastating consequences for all mankind.

Considering that effective measures to limit anti-ballistic missile systems would be a substantial factor in curbing the race in strategic offensive arms and would lead to a decrease in the risk of outbreak of war involving nuclear weapons.

Proceeding from the premise that the limitation of anti-ballistic missile systems, as well as certain agreed measures with respect to the limitation of strategic offensive arms, would contribute to the creation of more favorable conditions for further negotiations on limiting strategic arms.

Mindful of their obligations under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons.

Declaring their intention to achieve at the earliest possible date the cessation of the

nuclear arms race and to take effective measures toward reductions in strategic arms, nuclear disarmament, and general and complete disarmament.

Desiring to contribute to the relaxation of international tension and the strengthening of trust between States.

Have agreed as follows:

**ARTICLE I**

1. Each party undertakes to limit anti-ballistic missile (ABM) systems and to adopt other measures in accordance with the provisions of this Treaty.

2. Each Party undertakes not to deploy ABM systems for a defense of the territory of its country and not to provide a base for such a defense, and not to deploy ABM systems for defense of an individual region except as provided for in Article III of this Treaty.

**ARTICLE II**

1. For the purpose of this Treaty an ABM system is a system to counter strategic ballistic missiles or their elements in flight trajectory, currently consisting of

(a) ABM interceptor missiles, which are interceptor missiles constructed and deployed for an ABM role, or of a type tested in an ABM mode;

(b) ABM launchers, which are launchers constructed and deployed for launching ABM interceptor missiles; and

(c) ABM radars, which are radars constructed and deployed for an ABM role, or of a type tested in an ABM mode

2. The ABM system components listed in paragraph 1 of this Article include those which are:

- (a) operational;
- (b) under construction;
- (c) undergoing testing;
- (d) undergoing overhaul, repair or conversion; or
- (e) mothballed.

**ARTICLE III**

Each Party undertakes not to deploy ABM systems or their components except that:

(a) within one ABM system deployment area having a radius of one hundred and fifty kilometers and centered on the Party's national capital, a Party may deploy: (1) no more than one hundred ABM launchers and no more than one hundred ABM interceptor missiles at launch sites, and (2) ABM radars within no more than six ABM radars complexes, the area of each complex being circular and having a diameter of no more than three kilometers; and

(b) within one ABM system deployment area having a radius of one hundred and fifty kilometers and containing ICBM silo launchers, a Party may deploy: (1) no more than one hundred ABM launchers and no more than one hundred ABM interceptor missiles at launch sites, (2) two large phased-array ABM radars comparable in potential to corresponding ABM radars operational or under construction on the date of signature of the Treaty in an ABM system deployment area containing ICBM silo launchers, and (3) no more than eighteen ABM radars each having a potential less than the potential of the smaller of the above-mentioned two large phased-array ABM radars.

**ARTICLE IV**

The limitations provided for in Article III shall not apply to ABM systems or their components used for development of testing, and located within current or additionally agreed test ranges. Each Party may have no more than a total of fifteen ABM launchers at test ranges.

**ARTICLE V**

1. Each Party undertakes not to develop, test, or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land-based.

2. Each Party undertakes not to develop, test, or deploy ABM launchers for launching more than one ABM interceptor missile at a time from each launcher, not to modify deployed launchers to provide them with such a capability, not to develop, test, or deploy automatic or semi-automatic or other similar systems for rapid reload of ABM launchers.

**ARTICLE VI**

To enhance assurance of the effectiveness of the limitations on ABM systems and their components provided by the Treaty, each Party undertakes:

(a) not to give missiles, launchers, or radars, other than ABM interceptor missiles, ABM launchers, or ABM radars, capabilities to counter strategic ballistic missiles or their elements in flight trajectory, and not to test them in an ABM mode; and

(b) not to deploy in the future radars for early warning of strategic ballistic missile attack except at locations along the periphery of its national territory and oriented outward

**ARTICLE VII**

Subject to the provisions of this Treaty, modernization and replacement of ABM systems or their components may be carried out.

**ARTICLE VIII**

ABM systems or their components in excess of the numbers or outside the areas specified in this Treaty, as well as ABM systems or their components prohibited by this Treaty, shall be destroyed or dismantled under agreed procedures within the shortest possible agreed period of time.

**ARTICLE IX**

To assure the viability and effectiveness of this Treaty, each Party undertakes not to transfer to other States, and not to deploy outside its national territory, ABM systems or their components limited by this Treaty.

**ARTICLE X**

Each Party undertakes not to assume any international obligations which would conflict with this Treaty.

**ARTICLE XI**

The Parties undertake to continue active negotiations for limitations on strategic offensive arms.

**ARTICLE XII**

1. For the purpose of providing assurance of compliance with the provisions of this Treaty, each Party shall use national technical means of verification at its disposal in a manner consistent with generally recognized principles of international law.

2. Each Party undertakes not to interfere with the national technical means of verification of the other Party operating in accordance with paragraph 1 of this Article.

3. Each Party undertakes not to use deliberate concealment measures which impede verification by national technical means of compliance with the provisions of this Treaty. This obligation shall not require changes in current construction, assembly, conversion, or overhaul practices.

**ARTICLE XIII**

1. To promote the objectives and implementation of the provisions of this Treaty, the Parties shall establish promptly a Standing Consultative Commission, within the framework of which they will:

(a) consider questions concerning compliance with the obligations assumed and re-

ambiguities which may be considered

(b) provide on a voluntary basis such information as either Party considers necessary to assure confidence in compliance with the obligations assumed

(c) consider questions involving unintended interference with national technical means of verification.

(d) consider possible changes in the strategic situation which have a bearing on the provisions of this Treaty.

(e) agree upon procedures and dates for destruction or dismantling of ABM systems or their components in cases provided for by the provisions of this Treaty.

(f) consider, as appropriate, possible proposals for further increasing the viability of the Treaty, including proposals for amendments in accordance with the provisions of this Treaty.

(g) consider, as appropriate, proposals for further measures aimed at limiting strategic arms.

2. The Parties through consultation shall establish and may amend as appropriate, Regulations for the Standing Consultative Commission governing procedures, composition and other relevant matters.

#### ARTICLE XIV

1. Each Party may propose amendments to this Treaty. Agreed amendments shall enter into force in accordance with the procedures governing the entry into force of this Treaty.

2. Five years after entry into force of this Treaty, and at five-year intervals thereafter, the Parties shall together conduct a review of this Treaty.

#### ARTICLE XV

1. This Treaty shall be of unlimited duration.

2. Each Party shall, in exercising its national sovereignty, have the right to withdraw from this Treaty if it decides that extraordinary events related to the subject matter of this Treaty have jeopardized its supreme interests. It shall give notice of its decision to the other Party six months prior to withdrawal from the Treaty. Such notice shall include a statement of the extraordinary events the notifying Party regards as having jeopardized its supreme interests.

#### ARTICLE XVI

1. This Treaty shall be subject to ratification in accordance with the constitutional procedures of each Party. The Treaty shall enter into force on the day of the exchange of instruments of ratification.

2. This Treaty shall be registered pursuant to Article 102 of the Charter of the United Nations.

DONE at Moscow on May 26, 1972, in two copies, each in the English and Russian languages, both texts being equally authentic.

FOR THE UNITED STATES OF AMERICA,

RICHARD NIXON,  
President of the  
United States of  
America.

FOR THE UNION OF SOVIET  
SOCIALIST REPUBLICS,

L. I. BREZHNEV,  
General Secretary of  
the Central Committee of the  
CPSU.

### AGREED STATEMENTS, COMMON UNDERSTANDINGS, AND UNILATERAL STATEMENTS REGARDING THE TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE UNION OF SOVIET SOCIALIST REPUBLICS ON THE LIMITATION OF ANTI-BALLISTIC MISSILES

#### 1. AGREED STATEMENTS

The document set forth below was agreed upon and initialed by the Heads of the Delegations on May 26, 1972 (letter designations added):

Agreed statements regarding the treaty between the United States of America and the Union of Soviet Socialist Republics on the limitation of Anti-Ballistic Missile Systems:

#### [A]

The Parties understand that in addition to the ABM radars which may be deployed in accordance with subparagraph (a) of Article III of the Treaty, those non-phased-array ABM radars operational on the date of signature of the Treaty within the ABM system deployment area for defense of the national capital may be retained.

#### [B]

The Parties understand that the potential (the product of mean emitted power in watts and antenna area in square meters) of the smaller of the two large phased-array ABM radars referred to in subparagraph (b) of Article III of the Treaty is considered for purposes of the Treaty to be three million.

#### [C]

The Parties understand that the center of the ABM system deployment area centered on the national capital and the center of the ABM system deployment area containing ICBM silo launchers for each Party shall be separated by no less than thirteen hundred kilometers.

#### [D]

In order to insure fulfillment of the obligation not to deploy ABM systems and their components except as provided in Article III of the Treaty, the Parties agree that in the event ABM systems based on other physical principles and including components capable of substituting for ABM interceptor missiles, ABM launchers, or ABM radars are created in the future, specific limitations on such systems and their components would be subject to discussion in accordance with Article XIII and agreement in accordance with Article XIV of the Treaty.

#### [E]

The Parties understand that Article V of the Treaty includes obligations not to develop, test or deploy ABM interceptor missiles for the delivery by each ABM interceptor missile of more than one independently guided warhead.

#### [F]

The Parties agree not to deploy phased-array radars having a potential (the product of mean emitted power in watts and antenna area in square meters) exceeding three million, except as provided for in Articles III, IV and VI of the Treaty, or except for the purposes of tracking objects in outer space or for use as national technical means of verification.

#### [G]

The Parties understand that Article IX of the Treaty includes the obligation of the U.S. and the USSR not to provide to other States technical descriptions or blue prints specially worked out for the construction of ABM systems and their components limited by the Treaty.

#### 2. COMMON UNDERSTANDINGS

Common understanding of the Parties on the following matters was reached during the negotiations.

#### A. Location of ICBM Defenses

The U.S. Delegation made the following statement on May 26, 1972:

Article III of the ABM Treaty provides for each side one ABM system deployment area centered on its national capital and one ABM system deployment area containing ICBM silo launchers. The two sides have registered agreement on the following statement. "The Parties understand that the center of the ABM system deployment area centered on the national capital and the center of the ABM system deployment area containing ICBM silo launchers for each Party shall be separated by no less than thirteen hundred kilometers." In this connection, the U.S. side notes that its ABM system deployment area for defense of ICBM silo launchers, located west of the Mississippi River, will be centered in the Grand Forks ICBM silo launcher deployment area. (See Agreed Statement [C].)

#### B. ABM Test Ranges

The U.S. Delegation made the following statement on April 26, 1972:

Article IV of the ABM Treaty provides that "the limitations provided for in Article III shall not apply to ABM systems or their components used for development or testing, and located within current or additionally agreed test ranges." We believe it would be useful to assure that there is no misunderstanding as to current ABM test ranges. It is our understanding that ABM test ranges encompass the area within which ABM components are located for test purposes. The current U.S. ABM test ranges are at White Sands, New Mexico, and at Kwajalein Atoll, and the current Soviet ABM test range is near Sary Shagan in Kazakhstan. We consider that non-phased array radar of types used for range safety or instrumentation purposes may be located outside ABM test ranges. We interpret the reference in Article IV to "additionally agreed" ranges to mean that ABM components will not be located at any other test ranges without prior agreement between our Governments that there will be such additional ABM test ranges.

On May 5, 1972, the Soviet Delegation stated that there was a common understanding on what ABM test ranges were, that the use of the types of non-ABM radars for range safety or instrumentation was not limited under the Treaty, that the reference in Article IV to "additionally agreed" test ranges was sufficiently clear, and that national means permitted identifying current test ranges.

#### C. Mobile ABM Systems

On January 29, 1972, the U.S. Delegation made the following statement:

Article V(1) of the Joint Draft Text of the ABM Treaty includes an undertaking not to develop, test, or deploy mobile land-based ABM systems and their components. On May 5, 1971, the U.S. side indicated that, in its view, a prohibition on deployment of mobile ABM systems and components would rule out the deployment of ABM launchers and radars which were not permanent fixed types. At that time, we asked for the Soviet view of this interpretation. Does the Soviet side agree with the U.S. side's interpretation put forward on May 5, 1971.

On April 13, 1972, the Soviet Delegation said there is a general common understanding on this matter.

**D. Standing Consultative Commission**

Ambassador Smith made the following statement on May 22, 1972:

The United States proposes that the sides agree that, with regard to initial implementation of the ABM Treaty's Article XIII on the Standing Consultative Commission (SCC) and of the consultation Articles to the Interim Agreement on offensive arms and the Accidents Agreement,<sup>1</sup> agreement establishing the SCC will be worked out early in the follow-on SALT negotiations; until that is completed. The following arrangements will prevail when SALT is in session, any consultation desired by either side under these Article can be carried out by the two SALT Delegations; when SALT is not in session, *ad hoc* arrangements for any desired consultations under these Articles may be made through diplomatic channels.

Minister Semenov replied that, on an *ad referendum* basis, he could agree that the U.S. statement corresponded to the Soviet understanding.

**E. Standstill**

On May 6, 1972, Minister Semenov made the following statement:

In an effort to accommodate the wishes of the U.S. side, the Soviet Delegation is prepared to proceed on the basis that the two sides will in fact observe the obligations of both the interim Agreement and the ABM Treaty beginning from the date of signature of these two documents.

In reply, the U.S. Delegation made the following statement on May 20, 1972.

**ARMS CONTROL AND DISARMAMENT AGREEMENTS**

The U.S. agrees in principle with the Soviet statement made on May 6 concerning observance of obligations beginning from date of signature but we would like to make clear our understanding that this means that pending ratification and acceptance, neither side would take any action prohibited by the agreements after they had entered in force. This understanding would continue to apply in the absence of notification by either signatory of its intention not to proceed with ratification or approval.

The Soviet Delegation indicated agreement with the U.S. statement.

**3. UNILATERAL STATEMENTS**

The following noteworthy unilateral statements were made during the negotiations by the United States Delegations:

**A. Withdrawal from the ABM Treaty**

On May 9, 1972, Ambassador Smith made the following statement:

The U.S. Delegation has stressed the importance the U.S. Government attaches to achieving agreement on more complete limitations on strategic offensive arms, following agreement on an ABM Treaty and on an Interim Agreement on certain measures with respect to the limitation of strategic offensive arms. The . . . Delegation believes that an objective of the follow-on negotiations should . . . constrain and reduce on a long-term basis threats to the survivability of . . . respective strategic retaliatory forces. The USSR Delegation has also indicated that the objectives of SALT would remain unfulfilled without the achievement of an agreement providing for more complete limitation on strategic offensive arms. Both sides recognize that the initial agreements would be steps toward the achievement of more complete limitations on strategic

arms. If an agreement providing for more complete strategic offensive arms limitations were not achieved within five years, U.S. supreme interests could be jeopardized. Should that occur, it would constitute a basis for withdrawal from the ABM Treaty. The U.S. does not wish to see such a situation occur, nor do we believe that the USSR does. It is because we wish to prevent such a situation that we emphasize the importance the U.S. Government attaches to achievement of more complete limitations on strategic offensive arms. The U.S. Executive will inform the Congress, in connection with Congressional consideration of the ABM Treaty and the interim Agreement of this statement of the U.S. position.

**B. Tested in ABM Mode**

On April 7, 1972, the U.S. Delegation made the following statement:

Article of the Joint Text Draft uses the term "tested in an ABM mode" in defining ABM components and Article VI includes certain obligations concerning such testing. We believe that the sides should have a common understanding of this phrase. First, we would note that the testing provisions of the ABM Treaty are intended to apply to testing which occurs after the date of signature of the Treaty, and not to any testing which may have occurred in the past. Next, we would amplify the remarks we have made on this subject during the previous Helsinki phase by setting forth the objectives which govern the U.S. view on the subject, namely, while prohibiting testing of non-ABM components for ABM purposes: not to prevent testing of ABM components, and not to prevent testing of non-ABM components . . . non-ABM purposes. To clarify our interpretation of "tested in an ABM mode" we note that we would consider a launcher, missile or radar to be "tested in an ABM mode" if, for example, any of the following events occur (1) a launcher is used to launch an ABM interceptor missile, (2) an interceptor missile is flight tested against a target vehicle which has a flight trajectory with characteristics of a strategic ballistic missile flight trajectory, or is flight tested in conjunction with the test of an ABM interceptor missile or an ABM radar at the same test range, or is flight tested to an altitude inconsistent with interception of targets against which air defenses are deployed, (3) a radar makes measurements on a cooperative target vehicle of the kind referred to in item (2) above during the reentry portion of its trajectory or makes measurements in conjunction with the test of an ABM interceptor missile or an ABM radar at the same test range. Radars used for purposes such as range safety or instrumentation would be exempt from application of these criteria.

**C. No Transfer Article of ABM Treaty**

On April 18, 1972, the U.S. Delegation made the following statement:

In regard to this Article [IX], I have a brief and I believe self-explanatory statement to make. The U.S. side wishes to make clear that the provisions of this Article do not set a precedent for whatever provision may be considered for a Treaty on Limiting Strategic Offensive Arms. The question of transfer of strategic offensive arms is a far more complex issue, which may require a different solution.

**D. No Increase in Defense of Early Warning Radars**

On July 28, 1970, the U.S. Delegation made the following statement:

Since Hen House radars [Soviet ballistic missile early warning radars] can detect and track ballistic missile warheads at great distances, they have a significant ABM poten-

tial. Accordingly, the U.S. would regard any increase in the defenses of such radars by surface-to-air missiles as inconsistent with an agreement.

Mr. NUNN. Mr. President, I have a letter from Judge Sofaer on the subject I was addressing. In that letter, without trying to quote it directly because I do not have it with me, he mentioned he is going to go back through this Senate record very carefully and thoroughly. He also indicates that his prime consideration when he was doing his original research was on the negotiating record of the treaties rather than the Senate record.

So I ask unanimous consent that letter, by way of explanation, from Judge Sofaer be inserted in the RECORD.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

U.S. DEPARTMENT OF STATE,

THE LEGAL ADVISER,

Washington, DC, March 9, 1987.

Hon. SAM NUNN,  
U.S. Senate, Washington, DC.

DEAR SENATOR NUNN: As you know, the President has directed that further work be done on the remaining issues associated with the interpretation of the ABM Treaty. This additional work will focus on the ratification process, and on subsequent practice of the parties; April 30 is the target for completion.

The points made on the ratification record of the Treaty that were contained in our October 1985 analysis of the negotiating record did not provide a complete portrayal of the ratification proceedings with respect to this issue. I concentrated during that period on the Treaty language and negotiating history, and I did not review this material personally. The August 1986 study provided to the Senate was not as comprehensive as the current project directed by the President. (It was never meant to be; the August 1986 study covered primarily the Treaty itself and its negotiating record.) The study is more complete, but still fails to cover the subject in full depth. This is why, among other things, the President directed that a thorough study of the ratification record—and of subsequent practice—be undertaken. I will personally review this material and satisfy myself that the analysis we present is complete.

I would note in this connection that my August 1986 classified memorandum to Secretary Shultz did not include various statements in the ratification record which I acknowledged supported the restrictive interpretation, and that these statements may have a bearing on the President's obligations to the Senate. The current study will fully reflect these and other parts of the ratification record. I should also note, however, that the U.S. internal ratification process cannot by itself create international obligations under the Treaty; the Soviet Union does not hold itself to review and be responsible for responding to statements made during U.S. internal proceedings, any more than we held ourselves responsible for responding to Soviet internal proceedings.

I would welcome the opportunity to discuss the negotiating record with you, or any other issue. Our position on the negotiating record is not based on artificial distinctions, but rests on an objective appraisal of Soviet behavior during the negotiations. Nor do we agree that our reading of the record under-

<sup>1</sup> See Article 7 of Agreement to Reduce the Risk of Outbreak of Nuclear War Between the United States of America and the Union of Soviet Socialist Republics, signed Sept. 30, 1971.

March 11, 1987

cuts the basic purposes of the Treaty. Even if the parties were allowed to "create" only fixed, land-based devices by Agreed Statement D, such devices could potentially provide a territorial defense, if deployed. The parties relied on the Treaty's deployment provisions to block any deployment action inconsistent with the Treaty, unless the parties agreed, after consultation, to permit such deployments.

In connection with your analysis of the negotiating record, we have nothing new to add, though we are continuing to search for relevant materials. We believe, however, that in evaluating that record you should keep in mind the standard which the Soviets would apply in deciding whether they are bound to the "narrow" version of the Treaty. The Soviets have applied a strict standard in the past in connection with U.S. claims that they were bound to a given interpretation of an arms control agreement. We are collecting materials relevant to this question. Meanwhile, however, you no doubt recall the Soviet position on our unilateral statement on what constituted a "heavy" missile in the SALT I Interim Agreement. They also led us to believe they had no test range at Kamchatka, making clear the need for us to pin down any obligation. I will shortly provide you with a more detailed description of these instances of Soviet negotiating conduct for your appraisal.

If you agree, Mr. Nitze would like to join me in our discussion so that he could contribute his judgment on the policy issues involved.

Sincerely yours,

ABRAHAM D. SOFAER.

Mr. NUNN. Mr. President, I thank the Senator from West Virginia for arranging this rather lengthy time. I think that this matter requires lengthy explanation. I know it is unusual, but I appreciate the time the Senator has accorded me this afternoon.

I also want to say that the Senator from West Virginia has done his own analysis in this area. I have not discussed with him in great detail his conclusions. I am not sure if we are on par on everything, but I will be looking forward with great anticipation hearing the Senator from West Virginia's views when he does address this subject.

(During Mr. NUNN's remarks, Mr. HARKIN assumed the chair.)

Mr. BYRD. Mr. President, I thank the distinguished Senator from Georgia. He has approached this important matter, as he approaches all such subjects, very studiously and, in a very scholarly presentation, has stated clearly today his analysis of the matter. As I understand it, he will be speaking again on the Senate floor on the subject. May I ask, is it his intention to speak again tomorrow and/or on Friday if the Senate is in session both days?

Mr. NUNN. Mr. President, I will have the portion on the subsequent behavior of the two parties, that is the United States and the Soviet Union subsequent to the treaty being ratified, I would have that prepared and ready by tomorrow. If the Senate is in session, it would be my intention to present it then. I hope to have the analysis of the negotiating record

ready by Friday. It would be my intention to present those at that time, hopefully in better voice.

Mr. BYRD. Mr. President, the Senator has spoken under difficult conditions today, with his case of laryngitis.

The Senate will be in tomorrow, if the Senator wishes to speak on the subject tomorrow.

Mr. NUNN. I would like to get some time tomorrow that is appropriate and convenient to the leadership.

Mr. BYRD. Very well. That will be arranged.

I compliment the able Senator on the presentation of his analysis on the subject. He has been going into the historic record, the negotiating record, the record of the Senate debates, the understanding of the Senate, the understanding of committees in the Senate that conducts hearings. His analysis should be read and carefully considered by the administration, by his colleagues here in the Senate, by the press, by the people. He renders a great service. When the Senator from Georgia speaks on a matter that involves our national defense, people listen. I listen. And I compliment him, and, more than that, I thank him for the work he has been doing. It takes a lot of his time.

He has been working laboriously at this task for many, many weeks. And I know that Senators recognize that Senator NUNN has done more work in this area and has given effort to it than has anybody else in the body. That is why we all listen when he speaks.

Mr. PELL addressed the Chair.

The PRESIDING OFFICER. The Senator from Rhode Island.

Mr. PELL. Mr. President, I regret that I was not here when the Senator from Georgia was giving his speech. I was presiding at a meeting on foreign relations. But I look forward to reading it. I rise merely to pay my respect to him, and my regard for him is of the highest order. I know the contributions he made on the floor this morning will be read by many of us. It will have an effect like a pebble falling into a pool of water where the ripples go out.

I wish him well. I hope his voice recovers for his appearance before our committee this afternoon for about 20 minutes.

Mr. NUNN. I will be there.

I thank the Senator from Rhode Island. I thank the Senator from West Virginia.

Mr. GRASSLEY addressed the Chair.

The PRESIDING OFFICER. The Senator from Iowa.

#### TRADE CROSSROADS

Mr. GRASSLEY. Mr. President, the 100th Congress is now beginning to formulate the direction of trade legislation in the shadow of mounting trade and budgetary deficits. Coupled with this action, the administration

proposes legislation to improve U.S. competitiveness.

Some will interpret the present mood that is going on in the Congress—and maybe the country as a whole—as protectionism on the rise in the United States. Yet many individuals—including myself—see it more as a move to open foreign markets now closed, and beef up trade laws not currently being enforced. Mired in all of this, however, loomed the real potential for a trade war between the United States and the European Common Market. This trade war was only recently sidestepped when a 4-year agreement was reached at the last moment.

As might be expected, this agreement drew mixed reviews. I happen to think it was not a very good agreement. The administration trumpeted it as a victory for the President's tough new negotiating posture. The corn growers said the agreement is more evidence that the Reagan administration has no backbone when it comes to trade negotiations. The Farm Bureau said the provisions were disappointing to feed grain producers, but may be the best deal possible at the particular time. As for others, they feel the battle merely shifted to a new front—and that could be the European fight against importation of our soybeans.

Most trade groups are hoping for progress in the new round of international trade talks scheduled in Geneva. Our goal will be to try and obtain concessions from Europe to reduce its huge export subsidies. Yet, our posture in this recent agreement may have already set the tone for some difficult discussions in the weeks ahead.

Most alarming to me is that, in less than 10 years, Europe has gone from one of the United States' biggest grain buyers to its most aggressive export competitor. How did they do all this? Did they have some kind of secret weapon? You bet! In one word it is called subsidies.

The time has come for us to get moving on this issue, within the framework of the GATT, as well as in the House and Senate. We must move now if we are to achieve any meaningful results in the attempt to halt our eroding trade posture.

The decline in agricultural exports have significantly cut into what was once a healthy agricultural trade surplus. Exports exceeded imports annually by over \$10 billion between 1974 and 1975—and in some years, by more than twice that amount. Now the United States has been running an annual trade deficit in processed food products since 1983.

This decline has had a number of serious repercussions throughout the U.S. economy. Farmers look to the export market to take the production from more than one-third of their cropland. Falling exports have result-